TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1911

No. [redacted] 36

PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF OREGON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

FILED APRIL 21, 1909.

(21,618.)

(21,618.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 822.

PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY, PLAINTIFF IN ERROR,

vs.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 11, 1909.

1 In the Supreme Court of the United States.

PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY,
a Corporation, Plaintiff in Error,
vs.
STATE OF OREGON, Defendant in Error.

Appeal from the Supreme Court of Oregon.

Opinion by Justice Bean.

Filed Feb. 2, 1909.

E. S. Pillsbury, Carey & Kerr and Harrison Allen, Attorneys for Plaintiff in Error.
A. M. Crawford, Attorney General, for Defendant in Error.

2-4 In the Supreme Court of the State of Oregon, March Term, 1908.

STATE OF OREGON, Plaintiff-Respondent,
vs.
PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Defendant-Appellant.

Appellant's Abstract of Record.

Appeal from the Judgment of the Circuit Court for Multnomah County—Hon. John B. Cleland, Judge.

E. S. Pillsbury, Carey & Kerr, Harrison Allen, Attorneys for Appellant.
Hon. A. M. Crawford, Attorney General; Hon. John Manning, District Attorney, Attorneys for Respondent.

5 In the Supreme Court of the State of Oregon, March Term, 1908.

STATE OF OREGON, Plaintiff-Respondent,
vs.
PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Defendant-Appellant.

APPELLANT'S ABSTRACT OF RECORD.

On the 16th day of May, 1907, the plaintiff filed in the circuit court for the county of Multnomah a

Complaint,

stating its cause of action as follows:

(Title.)

6 Comes now the plaintiff by A. M. Crawford, its attorney general, and John Manning, district attorney for the Fourth judicial district, and for cause of action alleges:

I.

That at all the times and dates hereinafter alleged the defendant was and still is a corporation, duly created, organized and existing under and by virtue of the laws of the state of Oregon, and having its principal office and place of business in the city of Portland, Multnomah county, Oregon.

II.

That on or about the 2nd day of April, A. D. 1907, the said defendant, in accordance with the request of the state treasurer of the state of Oregon therefor and in pursuance of the requirements of an initiative law requiring express, telephone, and telegraph companies to pay a license upon their gross receipts, passed by a vote of the people June 4, 1906, and promulgated by proclamation of the governor, dated June 25, 1906, and published as chapter 1 of the laws of 1907, duly made and filed with said state treasurer its annual statement showing its gross receipts and business transacted within the state of Oregon for the period beginning June 26, 1906, and ending December 31, 1906, to be $475,031.

III.

7 That the license due the state of Oregon from defendant under and by virtue of said act is two per centum upon the said sum of $475,031, to-wit: $9,500.62; that no part thereof has been paid, although more than thirty days has elapsed since said statement was required by the state treasurer of the state of Oregon of and by the defendant filed in said state treasurer's office.

IV.

That under and by virtue of the said act above mentioned, the additional sum of ten per centum of said license is due the plaintiff from defendant, to-wit: the sum of $950.06, for such failure to make payment of said license within the period of thirty days from and after the date said statement was required of the defendant as aforesaid, or from and after the date the same was filed with the treasurer of the state of Oregon, as before alleged, and there is now due and owing to the plaintiff from the defendant the sum of $9,500.62, license, and the sum of $950.06 for failure to pay the same within thirty days after the same became due and payable, to-wit: a total of $10,450.68.

Wherefore, plaintiff demands judgment against the defendant for the sum of $10,450.68, besides costs and disbursements in this action.

A. M. CRAWFORD,
Attorney General.
JOHN MANNING,
District Attorney, Fourth Judicial District,
Attorneys for Plaintiff.
By H. B. ADAMS, *Deputy.*

8 On the 14th day of September, 1907, the defendant filed its

Answer,

as follows:

(Title.)

Now comes the defendant, Pacific States Telephone and Telegraph Company, a corporation, and answering the complaint of the plaintiff herein, denies each and every allegation therein contained except that the defendant admits that it is a corporation as alleged in the complaint, and that it furnished the report referred to in the complaint, and that the volume of its business within the state of Oregon from June 25, 1905, to January 1, 1907, was as stated in the complaint and that two per cent. thereof is the amount demanded by plaintiff of defendant together with ten per cent. of said amount for failure to pay the same as alleged in the complaint, and that defendant has not paid said amount or any part thereof or said additional sum of ten per cent. of said amount, or any part thereof.

And further answering the complaint defendant avers:

I.

That this defendant was duly incorporated under the laws of the state of Oregon on the 8th day of May, 1900, and has ever since said 8th day of May, 1900, been, and still is, a corporation duly
9 organized and existing under and by virtue of said laws, and has ever since said 8th day of May, 1900, had and still has its residence and principal place of business in said state.

II.

That the state of Oregon was admitted into the union of the United States of America on the 14th day of February, 1859, by an act of congress entitled: "An act for the admission of Oregon into the union," approved February 14, 1859; that at the time of the said admission into the union of said state of Oregon, and thereafter and until the 2nd day of June, 1902, the legislative authority of the state of Oregon was vested in a legislature consisting of a senate and house of representatives under and by virtue of section 1 of article IV of the constitution of the state of Oregon, which provided as follows, and not otherwise, to-wit: "The legislative authority of the

state shall be vested in a legislative assembly consisting of a senat and house of representatives. The style of every bill shall be "B it enacted by the legislative assembly of the state of Oregon," and n law shall be enacted except by bill."

III.

That on the first Monday in June, 1902, the people of Orego undertook and endeavored to amend the constitution of the state o Oregon by adopting by popular vote the following as an amendmen thereto:

"Section 1 of article IV of the constitution of the state o
10 Oregon shall be and hereby is amended to read as follows:

"SECTION 1. The legislative authority of the state shall b vested in a legislative assembly, consisting of a senate and house o representatives, but the people reserve to themselves power to propos laws and amendments to the constitution and to enact or reject th same at the polls, independent of the legislative assembly, and al reserve power at their own option to approve or reject at the poll any act of legislative assembly. The first power reserved by th people is the initiative, and not more than eight per cent. of the legi voters shall be required to propose any measure by such petition and every such petition shall include the full text of the measur so proposed. Initiative petitions shall be filed with the secretary o state not less than four months before the election at which they ar to be voted upon. The second power is the referendum, and it ma be ordered (except as to laws necessary for the immediate preserva tion of the public peace, health, or safety) either by the petitio signed by five per cent. of the legal voters, or by the legislative a sembly, as other bills are enacted. Referendum petitions shall b filed with the secretary of state not more than ninety days after th final adjournment of the session of the legislative assembly whic passed the bill on which the referendum is demanded. Th
11 veto power of the governor shall not extend to measure referred to the people. All elections on measures referre to the people of the state shall be had at the biennial regular genera elections, except when the legislative assembly shall order a specia election. Any measure referred to the people shall take effect an become the law when it is approved by a majority of the votes cas thereon, and not otherwise. The style of all bills shall be: "Be i enacted by the people of the state of Oregon." This section shal not be construed to deprive any member of the legislative assembl of the right to introduce any measure. The whole number of vote cast for justice of the supreme court at the regular election last pre ceding the filing of any petition for the initiative or for the referen dum shall be the basis on which the number of legal voters necessary to sign such petition shall be counted. Petitions and orders for th initiative and for the referendum shall be filed with the secretary of state, and in submitting the same to the people he, and all othe officers, shall be guided by the general laws and the act submitting this amendment, until legislation shall be especially provide therefor."

Said pretended amendment of section 1 of article IV of said constitution is hereinafter referred to as "said pretended amendment."

12 IV.

That pursuant to said pretended amendment the legislative assembly of the state of Oregon passed a pretended act entitled: "An act making effective the initiative and referendum and referendum provisions of section 1 of article IV of the constitution of the state of Oregon, and regulating elections thereunder and providing penalties for violations of provisions of this act," approved February 24, 1903, a copy whereof is hereunto annexed and marked Exhibit "A" and is hereby referred to and especially made a part hereof, and is hereinafter referred to as "said pretended act Exhibit 'A.'"

That pursuant to said pretended amendment and pursuant to said pretended act, Exhibit "A," and on the 3rd day of February, 1906, more than eight per cent. of the number of legal voters of the state of Oregon, casting votes for justice of the supreme court at the regular election next preceding said 3rd day of February, 1906, proposed a measure by petition by filing petitions with the secretary of state of the state of Oregon on said 3rd day of February, 1906, requiring express, telephone and telegraph companies engaged in business within the state of Oregon to pay a license tax upon their gross receipts; that thereupon said secretary of state, pursuant to said pretended act Exhibit "A," adjudged that said petitions were regular in form and that they were signed by the requisite number of

13 electors, and thereupon he granted the prayer of said petitions and submitted said measure to the vote of the people of the state of Oregon at a biennial regular general election held in said state on the 4th day of June, 1906, and placed the same upon the official ballot, as appears more fully from a copy of an official ballot voted at said election in Precinct No. 15 of Multnomah county in said state, hereto annexed and marked Exhibit "B," and hereby especially referred to and made a part hereof; that said Exhibit "B," is a true copy of the ballots used and voted at said election in all the voting precincts of said state, except as to local officers; and as to said measure, it is a true copy of all said ballots; that thereafter, and on said 4th day of June, 1906, said measure was approved by a majority of the votes cast thereon, and a majority of the voters voting at said election voted for the passage of said measure; that thereafter and on the 25th day of June, 1906, and pursuant to said pretended act Exhibit "A," said measure was promulgated by a proclamation of the governor of said state and published as chapter 1 of the laws of 1907 of the state of Oregon; that said measure approved as aforesaid on said 4th day of June, 1906, is in words and figures as follows, to-wit:

"Be it enacted by the people of the state of Oregon:

"SECTION 1. That every express company or corporation doing business in this state shall pay to the state of Oregon a

14 license of three (3) per centum upon the gross receipts of such company or corporation received in this state, and every telephone company or corporation doing business in this state and

every telegraph company or corporation doing business in this state shall pay to the state of Oregon a license of two (2) per centum upon the gross receipts of such company or corporation received in this State; which license shall be paid annually by such company or corporation to the treasurer of this state. And for the purpose of ascertaining the amount of the same, it shall be the duty of the president secretary and treasurer, or such of them as reside in this state, or if neither of said officers reside in this state, then of the general manager or other officer or agent of such company or corporation having general control, management or supervision of its business within this state, to transmit to the state treasurer, on or before the first day of March of each year, a statement, under oath, of the gross receipts of said company or corporation for business transacted within this state during the preceding year, ending December 31st of said year, and if such company or corporation shall fail to make such statement, or to pay any such license, for the period of thirty (30) days from and after such statement is required by this act to be made, or after such license is due and payable, as herein provided, the amount thereof, with the addition of ten (10) per centum thereon for such failure, shall be collected of such company or corporation, for the use of the state, and the same is hereby declared to be and is made a debt due and owing from such company or corporation to the state of Oregon, and the attorney general of the state, or district attorney of the proper judicial district, shall commence and prosecute to final determination in any court of competent jurisdiction, an action at law to collect the same, and to that end and to make this act more effective the said attorney general, or district attorney, as the case may be, or both, shall have the same power and authority to call before him or them, officers or agents of such delinquent company or corporation, and other witnesses, for examination bearing upon the earnings of such company or corporation, the same as may now be done by district attorneys of the state of Oregon in criminal matters; and it is hereby made the duty of the state treasurer to give notice to the attorney general of such failure to file such statement or to pay such license within ten days from and after the expiration of the said thirty days herein above mentioned.

"SECTION 2. If any officer or agent of any company or corporation mentioned in section 1 of this act shall fail, neglect, or refuse to make and file such annual statement of the gross receipts of the company or corporation of which he is such officer or agent, for thirty (30) days after the first day of March in each year, he shall be deemed to be guilty of a misdemeanor, and shall, on conviction thereof, be punished by a fine of not less than five hundred ($500) nor more than one thousand ($1,000) dollars, or by imprisonment in the county jail not less than thirty (30) days nor more than six (6) months, or by both such fine and imprisonment in the discretion of the court; and the district attorney of the proper judicial district shall commence and prosecute to final determination in any court of competent jurisdiction an action at law to enforce this penalty.

"SECTION 3. That any person or persons, joint stock company

or corporation, wherever organized or incorporated when engaged in the business of conveying to, from, or through this state, or any part thereof, money, packages, gold, silverplate, merchandise, or other articles, by express, not including the ordinary manner of transportation customarily designated as freight, shall be deemed to be an express company. That any person or persons, joint stock company, or corporation, wherever organized or incorporated, when engaged in the business — transmitting to, from, through, or
17 in this state, telephone messages, shall be deemed to be a telephone company. That any person or persons, joint stock company, or corporation, wherever organized or incorporated, when engaged in the business of transmitting to, from, through or in this state, telegraph messages, shall be deemed to be a telegraph company.

"SECTION 4. In addition to the statement of gross receipts required by the provisions of section 1 of this act such statement shall also contain the following facts:

"First. The name of the company.

"Second. The nature of the company, whether a person or persons, company or corporation and under the laws of what state or country it was organized.

"Third. The location of the principal office of such business or company.

"Fourth. The name, post-office address, and place of residence of the president, secretary, treasurer, superintendent, and general manager.

"Fifth. The name, post-office address, and place of residence of the chief officer or managing agent of the company or business in this state."

Said measure is hereinafter referred to as "said pretended initiative measure."

That said pretended initiative measure is the measure re-
18 ferred to in paragraphs 3 and 4 of the complaint herein, and is the measure pursuant to the provisions whereof said sum of ninety-five hundred dollars and sixty-two cents ($9,500.62) is alleged to be due from this defendant to plaintiff and pursuant to the provisions whereof said sum of nine hundred and fifty dollars and six cents ($950.06) is alleged to be due from this defendant to plaintiff for failure to pay said sum of ninety-five hundred dollars and sixty-two cents ($9,500.62).

IV.

That at the time said pretended initiative measure was voted on as aforesaid, and at the time the same was promulgated by the governor of the state of Oregon as aforesaid, the legislative assembly of the state of Oregon was not in session; that there was no session of the legislative assembly of the state of Oregon held between the month of February, 1905, and the month of January, 1907; that said pretended initiative measure was not considered or enacted or published as a law or otherwise by the legislative assembly of the state of Oregon; that said pretended initiative measure was not considered by or submitted to the deliberations of, or read before its pretended

enactment by, and was not enacted by, any legislative or other representatives of the people, or of any part of the people, of the state of Oregon, or any legislative assembly or assemblies or representatives of the people, or of any part of the people, of the state of
19 Oregon, and said pretended initiative measure, before its pretended enactment, was not submitted to, or considered by and was not approved by, the governor of the state of Oregon, or any executive, or administrative, or other officer, or official of the government of the state of Oregon, or any representative of the people, or of any part of the people, of the state of Oregon; that said pretended initiative measure was never introduced before or referred to or considered by or passed upon by, or in any way acted upon by any representatives of the people, or of any part of the people, of the state of Oregon, or by any officer or branch or department of the government of said state, but said pretended initiative measure was enacted, so far as it has been enacted at all, wholly and solely by the direct vote of a majority of the voters of the state of Oregon voting at said election, and in the manner before stated, and not otherwise.

VII.

That said pretended initiative measure was proposed and voted on and promulgated as hereinbefore set forth, solely pursuant to the provisions and under the sole authority of said pretended amendment, and of said pretended act Exhibit "A," and not otherwise.

VIII.

That said pretended initiative measure is null and void
20 and of no effect because said pretended amendment and said pretended act Exhibit "A," if enforced, will render nugatory and will destroy the representative legislative assembly and the legislative power of the representative legislative assembly of the state of Oregon contrary to and in violation of the provisions contained in article 1, section 2, and in article 1, section 3, and in article 1, section 4, and in article 1, section 8, and in article 4, section 3, and in article 4, section 4, and in article 5, and in article 6, of the constitution of the United States, and in article XIV of the amendments to the constitution of the United States, that the several states of the Union shall create and maintain representative legislative assemblies; and because said pretended amendment and said pretended act Exhibit "A," are and each of them, is contrary to and in violation of the implied provision of the constitution of the United States that the government of the several states shall be representative in form and that the several states shall create and maintain representative legislative assemblies.

IX.

That said pretended initiative measure is null and void and of no effect because said pretended amendment and said pretended act Exhibit "A," purport, and each of them purports, to create and provide for a legislature, to-wit: a part of the voters of the state of

Oregon not elected by the people of the state of Oregon and
21 purport, and each of them purports, to abrogate the existence of electors for the most numerous branch of the legislature of this state, to-wit: a part of the voters of said State, thereby making impossible the determination of the qualifications necessary in the state of Oregon for electors of the members from said state of the house of representatives of the United States, contrary to and in violation of the provisions of section 2, article 1, of the constitution of the United States that the house of representatives shall be composed of members chosen every second year by the people of the several states, and that the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

X.

That said pretended initiative measure is null and void and of no effect because said pretended amendment and said pretended act Exhibit "A," empower, and each of them empowers, a part of the voters of the state of Oregon, by their direct vote, to deprive, and purport, and each of them purports, to deprive the representative legislative assembly of the state of Oregon of the power to consent to the purchase by the congress of the United States of places in the state of Oregon for the erection of forts, magazines, arsenals, dockyards, and other needful buildings contrary to and in violation of the provisions of section 8, article 1, of the constitution of the United States.

22 XI.

That said initiative measure is null and void and of no effect because said pretended amendment and said pretended act Exhibit "A" empower, and each of them empowers, a part of the voters of the state of Oregon, by their direct vote, to deprive and purport, and each of them purports, to deprive the representative legislative assembly of the state of Oregon of the power to prescribe the times, place and manner of the holding elections for senators and representatives in the congress of the United States, contrary to and in violation of the provisions of section 4, article 1, of the constitution of the United States.

XII.

That said pretended initiative measure is null and void and of no effect because said pretended amendment and said pretended act Exhibit "A" empower, and each of them empowers, a part of the voters of the state of Oregon, by their direct vote, to deprive and purport and each of them purports to deprive the representative legislative assembly of the state of Oregon of the power to direct the manner in which the state of Oregon shall appoint electors for the election of the president and vice president of the United States of America, contrary to and in violation of the provisions of section 1, article II of the constitution of the United States.

23

XIII.

That said pretended initiative measure is null and void and of no effect because said pretended amendment and said pretended act Exhibit "A" empower, and each of them empowers, a part of the voters of the state of Oregon, by their direct vote, to deprive and purport, and each of them purports, to deprive the representative legislative assembly of the state of Oregon of the power or consent to the junction of the state of Oregon, with one or more states or parts of states of the union, contrary to and in violation of the provisions of section 3, article IV, of the constitution of the United States.

XIV.

That said pretended initiative measure is null and void and of no effect because said pretended amendment and said pretended act Exhibit "A" empower, and each of them empowers, a part of the voters of the state of Oregon, by their direct vote, to deprive, and purport, and each of them purports, to deprive the representative legislative assembly of the state of Oregon of the power to apply to the United States for protection against domestic violence within the state of Oregon, contrary to and in violation of the provisions of section 4, article IV, of the constitution of the United States.

XV.

That said pretended initiative measure is null and void
24 and of no effect because said pretended amendment and said pretended act Exhibit "A" empower, and each of them empowers, a part of the voters of the state of Oregon, by their direct vote, to deprive, and purport, and each of them purports, to deprive the representative legislative assembly of the state of Oregon of the power to apply to the congress of the United States for a convention for proposing amendments to the constitution of the United States, and of the power to ratify amendments proposed to the constitution of the United States, contrary to and in violation of the provisions of article V, of the constitution of the United States.

XVI.

That said pretended initiative measure is null and void and of no effect because said pretended amendments and said pretended act Exhibit "A" empower, and each of them empowers, a part of the voters of the state of Oregon, by their direct vote, to deprive and purport, and each of them purports, to deprive the representative legislative assembly of the state of Oregon of the power to choose the senators from said state for the senate of the United States contrary to and in violation of the provisions of section 3, of article I, of the constitution of the United States.

XVII.

That said pretended initiative measure and said pretended
25 amendment and said pretended act Exhibit "A" are, and each of them is, contrary to and in violation of the rights,

privileges and immunities of the defendant under and pursuant to the provisions of section 4, article IV, of the constitution of the United States, and are, and each of them is, contrary to and in violation of the provisions of section 4, of article IV, of the constitution of the United States, and are, and each of them is, unrepublican and contrary to and inconsistent with and violative of a republican form of government, and therefore are, and each of them is, null and void and of no effect.

XVIII.

That said pretended initiative measure is null and void and of no effect because said pretended amendment and said pretended act Exhibit "A" purport, and each of them purports, to provide for and pretend, and each of them pretends, to create a legislative body or legislature in the state of Oregon, to-wit: a part of the voters of said state prepared and empowered at all times and continuously to enact legislation contrary to and in violation of the provisions of section 3, article I, and of section 4, of article IV of the constitution of the United States that the legislatures of the several states of the union shall at times take a recess and shall from time to time meet and convene and be convened and adjourn, and contrary to and in violation of the provisions, and in derogation of the powers
26 conferred upon the executive of the state of Oregon by the provisions of said section 3 of said article I, that the executive of a state may make temporary appointments to the senate of the United States during a recess of the legislature of said state, and of said section 4, of said article IV, that the executive of a state may apply to the United States for protection against domestic violence when the legislature cannot be convened.

XIX.

That said pretended initiative measure is null and void and of no effect because said pretended amendment and said pretended act Exhibit "A" will, and each of them will, if enforced, create a legislature consisting wholly or in part of the voters of said state, acting as the legislature, or as a part of the legislature of said state, without their election as legislators and solely by reason of, and in their capacity as voters, and said pretended amendment and said pretended act Exhibit "A" purport and undertake and each of them purports and undertakes, to confer upon a part of the voters of the state of Oregon, as such, a part or all of the power to choose the senators from said state for the senate of the United States, and to consent to the purchase by the congress of the United States of places in the state of Oregon for the erection of forts, magazines, arsenals, dockyards and other needful buildings, and to prescribe the times,
27 places and manner of holding elections for senators and representatives in the congress of the United States, and to direct the manner in which the state of Oregon shall appoint electors for the election of the president and vice-president of the United States, and to consent to the junction of the state of Oregon with one or more states or parts of states of the union, and to apply to the United

States for protection against domestic violence within the state of Oregon, and to apply to the congress of the United States for a convention for proposing amendments to the constitution of the United States, and to ratify amendments proposed to the constitution of the United States contrary to and in violation of the provisions respectively of section 3 of article I, and of section 4 of article I, and of section 8 of article 1, and of section 1, of article II, and of section 3 of article IV, and of section 4 of article IV and of Article V of the constitution of the United States hereinbefore referred to, that said powers shall be exercised by the legislatures, to-wit: Representative legislative assembly of the several states, as hereinbefore set forth.

XX.

That said pretended initiative measure was not passed or enacted or adopted or promulgated in accordance with due process of law as prescribed by section 1, of article XIV, of the amendments of the constitution of the United States, and that the pretended
28 license or tax upon this defendant, or upon its gross receipts, purporting to be levied upon or assessed against defendant, or its gross receipts, by said pretended initiative measure is not levied or asses-ed by due process of law, and if defendant be compelled to pay said pretended license or tax, defendant will be deprived of its property without due process of law, contrary to and in violation of the rights, privileges and immunities of defendant under said section 1 of article XIV of the amendments to the constitution of the United States, and said pretended initiative measure denies to defendant the equal protection of the laws contrary to and in violation of the rights, privileges and immunities of defendant under said section 1 of article XIV of the amendments of the constitution of the United States.

XXI.

That at the time the state of Oregon was admitted into the union by said act of congress, approved February 14, 1859, as aforesaid, the state government and constitution of the state of Oregon were republican in form and in conformity with the constitution of the United States, and said state of Oregon was so admitted to the union upon the condition contained in said act of congress that the state government and constitution of the state of Oregon should be republican in form and in conformity with the constitution of the United States; that, as hereinbefore set forth, said pretended amendment
29 and said pretended act Exhibit "A" are, and each of them is, unrepublican in form and not in conformity with, but is contrary to, and in violation of, a republican form of government, and of the constitution of the United States, and contrary to and in violation of the said act of congress, and the condition of said act, approved February 14th, 1859, and contrary to and in violation of the rights, privileges and immunities under said act of congress of this defendant, a resident of said state of Oregon, and duly incorporated under and by virtue of the laws of the said state; and said pretended initiative measure, proposed and voted upon and promulgated pursuant to the provisions of said pretended amendment

and of said pretended act Exhibit "A" as aforesaid, is therefore null and void and of no effect.

XXII.

That said pretended amendment and said pretended act Exhibit "A" empower, and each of them empowers, a part of the voters of the state of Oregon by direct vote to deprive and purport and each of them purports, to deprive the legislative assembly of the state of Oregon of the powers conferred upon the legislative assembly of the state of Oregon by the propositions made by the congress of the United States to the people of the state of Oregon, by section 4 of the act entitled: "An act for the admission of Oregon into the union," approved February 14th, 1859, regarding the use and disposition of the public lands and the salt springs and of the net proceeds of sales of public lands and by the acceptance of said propositions by means of the act of the legislative assembly of the state of Oregon entitled: "An act relative to certain propositions made by the congress of the United States to the people of the state of Oregon," in effect September 2nd, 1859; and said pretended amendment and said pretended act Exhibit "A" purport and undertake, and each of them purports and undertakes, to confer upon a part of the voters of the state of Oregon as such, a part or all of said powers; that said pretended amendment and said pretended act Exhibit "A" do, and each of them does, impair the obligation of the contract between the state of Oregon and the United States of America as contained in said act of congress, approved February 14th, 1859, and in the acceptance of the propositions therein made by the congress of the United States to the people of the state of Oregon and accepted by the people of the state of Oregon, by said act of the legislative assembly of the state of Oregon, in effect September 2, 1859, to-wit: the contractual obligation of the state of Oregon to maintain a government republican in form and in conformity with the constitution of the United States, and to preserve to the legislative assembly of the state of Oregon the power to use and dispose of the public lands and the salt springs and the net proceeds of sales of public lands in the state of Oregon, contrary to and in violation of section 10 of article I of the constitution of the United States that no state shall pass a law impairing the obligation of a contract, and said pretended initiative measure is therefore null and void and of no effect.

XXIII.

That said pretended initiative measure is null and void and of no effect because said pretended amendment and said pretended act Exhibit "A" purport, and each of them purports, to create within the state of Oregon a legislature, or a part of a legislature, to-wit: a part of the voters of the state of Oregon empowered to legislate, without taking the oath or affirmation required by article VI of the constitution of the United States, and without taking the oath of office required by the act of congress approved June 1, 1789, section 1836 of the revised statutes of the United States, 1 Statutes at Large,

23 contrary to and in violation of said article VI of the constitution of the United States and of the provisions of said act approved June 1, 1789.

That said pretended initiative measure is null and void and of no effect because none of the voters of the state of Oregon voting on passage of said pretended initiative measure and in favor thereof, as hereinbefore set forth, did prior to so voting, take the oath or affirmation required by article VI of the constitution of the United States, or by the said act of congress approved June 1, 1789,

32 contrary to and in violation of said article VI of the constitution of the United States and contrary to and in violation of the provisions of said act.

XXIV.

That by its articles of incorporation the defendant at all the times herein mentioned was and still is authorized to construct, maintain and operate lines of telegraph in and between the various states of the union and including the state of Oregon; that on the 18th day of October, 1900, defendant duly filed its written acceptance with the postmaster general of the United States of the restrictions and obligations of an act of congress entitled: "An act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military and other purposes," approved July 24th, 1866; that in accordance with the authority of its said articles of incorporation and the said act of congress, the said defendant has ever since said 18th day of October, 1900, constructed, maintained and operated and still constructs, maintains and operates, lines of telegraph through and over portions of the public domain of the United States within the state of Oregon and elsewhere within the United States and over and along the post-roads of the United States within the state of Oregon and from the state of Oregon beyond the limits thereof to various states of the United States; that pursuant to said

act of congress approved July 24, 1866, defendant has since

33 the 18th day of October, 1900, been, and now is, engaged in sending and prepared and ready and willing to send telegraphic communications between the several departments of the government of the United States and their officers and agents, giving and prepared and ready and willing to give priority to said official telegraphic communications over all other business; and defendant avers that said official telegrams have, ever since said date, been and are sent, and defendant has, ever since said date, been and is now prepared and ready and willing to send said official telegrams at the rates fixed annually, ever since the said 18th day of October, 1900, by the postmaster general.

XXV.

That said pretended initiative measure is null and void and of no effect because it purports and undertakes to tax the business done by this defendant as a telegraph company with the officials of the government of the United States under and pursuant to the provisions of said act of congress approved July 24, 1866, and because said pre-

tended initiative measure purports and undertakes to tax the business of this defendant as an agency of the United States contrary to and in violation of the constitution of the United States and of section 8 of article 1 thereof that the congress shall have power to establish and maintain post offices and post roads.

34 XXVI.

That prior to the pretended enactment of said pretended initiative measure, to-wit: Prior to the 4th day of June, 1905, various telegraph companies other than this defendant and duly incorporated and organized under the laws of various states of the United States, and by their charters and articles of incorporation duly authorized to construct, maintain and operate lines of telegraph in and between various states of the union, including the state of Oregon, did at various dates prior to said 4th day of June, 1905, file their written acceptance with the postmaster general of the United States of the restrictions and obligations of an act of congress entitled: "An act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military and other purposes," approved July 24, 1866; that in accordance with the authority of their respective charters and articles of incorporation and pursuant to said act of congress, approved July 24, 1866, said telegraph companies did, prior to the 4th day of June, 1905, and thereafter continue to and still do construct, maintain and operate lines of telegraph through and over portions of the public domain of the United States within the state of Oregon and elsewhere within the United States, and over and along post roads of the United States within the state of Oregon and from the state of Oregon beyond the limits
35 thereof to the various states of the United States, and pursuant to said act of congress approved July 24, 1866, were prior to said 4th day of June, 1906, and have ever since been and still are engaged in sending telegraphic communications between the several departments of the government of the United States and their officers and agents, giving priority to said official telegraphic communications over all other business and sending said official telegrams at rates annually fixed by the postmaster general of the United States, in the manner done by and required of this defendant as hereinbefore set forth.

XXVII.

That said pretended initiative measure is null and void and of no effect because it purports and undertakes to tax the business of said telegraph companies done with the officials of the government of the United States under and pursuant to the provisions of said act of congress approved July 24, 1866; and because said pretended initiative measure purports and undertakes to tax the business of said telegraph companies as agents of the United States contrary to and in violation of the constitution of the United States and of section 8 of article I thereof, that the congress shall have power to establish and maintain post offices and post roads.

XXVIII.

That the authorized capital stock of this defendant exceeds
36 $2,000,000; that under and by virtue of the provisions of an act of the people of the state of Oregon and of the legislative assembly of the state of Oregon, entitled: "An act to provide for the licensing of domestic corporations and foreign corporations, joint stock companies and associations," etc., approved February 16, 1903, requiring corporations doing business in the state of Oregon to pay an annual license fee proportionate to their authorized capital stock, this defendant, prior to said pretended enactment of said pretended initiative measure purporting and undertaking to levy said tax upon the gross receipts of this defendant, did pay and ever since has paid at the times and in the manner provided by law an annual license fee of $200; that in the manner and at the times provided by law defendant, pursuant to the laws of the state of Oregon, did prior to said pretended enactment of said pretended initiative measure pay, and has ever since paid, state, county and school taxes levied in said state upon all of its property within the state of Oregon, including its franchise to do the business in said state which said pretended initiative measure purports and undertakes to tax and which said taxes upon its said property, including its said franchise, have been and still are from time to time levied and assessed against this defendant by the county of Multnomah, in said state.

That said pretended initiative measure purporting and
37 undertaking to levy said tax upon the gross receipts of this defendant is contrary to and in violation of section 32 of article I of the constitution of the state of Oregon, which at all the times in this answer mentioned has provided and still provides as follows to-wit: "No tax or duty shall be imposed without the consent of the people, or their representatives in the legislative assembly, and all taxation shall be equal and uniform," and said pretended initiative measure is therefore null and void and of no effect.

XXIX.

That said pretended initiative measure is not a valid imposition of a license or tax upon this defendant or upon its gross receipts, or any part thereof, and this defendant denies that there is any license due plaintiff from defendant in any sum whatsoever or that there is any additional sum or any amount whatsoever due plaintiff from defendant for failure to pay the license referred to in the complaint, or any license, within the time stated in the complaint, or within or at any time, and denies that there is now due and owing, or due or owing, from defendant to plaintiff the sum of ninety-five hundred dollars and sixty-two cents ($9500.62), or any sum, license or otherwise, or the sum of nine hundred and fifty dollars and six cents ($950.06), or any sum, for failure to pay said sum of ninety-five hundred dollars and sixty-two cents ($9500.62), or any sum
38 within the time stated in the complaint, or within or at any time, or for any reason, or at all.

Wherefore, defendant prays that it be hence dismissed with its costs of suit.

EXHIBIT "A."

An act making effective the initiative and referendum provisions of section 1 of article IV of the constitution of the state of Oregon, and regulating elections thereunder, and providing penalties for violations of provisions of this act.

Be it enacted by the people of the state of Oregon, and be it enacted by the legislative assembly of the state of Oregon:

SECTION 1. The following shall be substantially the form of petition for the referendum to the people on any act passed by the legislative assembly of the state of Oregon:

Petition for Referendum.

To the Honorable —— ——, Secretary of State for the State of Oregon:

We, the undersigned citizens and legal voters of the state of Oregon, respectfully order that senate (house) bill number —, entitled (title of act) passed by the — legislative assembly of the state of Oregon, at the regular (special) session of said legislative assembly, shall be referred to the people of the state for their approval or rejection, at the regular general election to be held
39 on the — day of ——, 19—, and each for himself says: I have personally signed this petition; I am a legal voter of the state of Oregon; and my residence, postoffice, and voting precinct are correctly written after my name.

Name.	Residence—If in city, street and number.	Post office.	Voting precinct.

(Here follow twenty numbered lines for signatures.)

SECTION 2. The following shall be substantially the form of petition for any law or amendment to the constitution of the state of Oregon, proposed by the initiative:

Initiative Petition.

To the Honorable —— ——, Secretary of State for the State of Oregon:

We, the undersigned legal voters of the state of Oregon, respectfully demand that the following proposed (law) amendment to the constitution shall be submitted to the legal electors of the state of Oregon, for their approval or rejection, at the regular general election to be held on the — day of ——, 19—, and each for himself says: I

have personally signed this petition, and my residence, postoffice, and voting precinct are correctly written after my name.

Name.	Residence—If in city, street and number.	Post office.	Voting precinct.

(Numbered lines for twenty names on each sheet.)

40 Every sheet for petitioners' signatures shall be attached to a full and correct copy of the title and text of the measure so proposed by initiative petition; but such petition may be filed with the secretary of state in numbered sections, for convenience in handling, and referendum petitions may be filed in sections in like manner.

SECTION 3. The county clerk of each county in which any such petition shall be signed shall compare the signatures of the electors signing the same with their signatures on the registration books and blanks on file in his office, for the preceding general election, and shall thereupon attach to the sheets of said petition containing such signatures, his certificate to the secretary of state, substantially as follows:

STATE OF OREGON,
County of ——, *ss:*

To the Honorable —— ——, Secretary of State for Oregon:

I, —— ——, county clerk for the county of ——, hereby certify that I have compared the signatures on (number of sheets) of the referendum (initiative) petition, attached hereto, with the signatures of said electors as they appear on the registration books and blanks in my office; and I believe that the signatures of (names of signers) numbering (number of genuine signatures) are genuine. As to the remainder of the signatures thereon, I believe they are not

41 genuine, except that the following names (——) do not appear on the registration books and blanks in my office.

(Signed) —— ——, *County Clerk.*
[Seal of office.] By —— ——, *Deputy.*

Every such certificate shall be *prima facie* evidence of the facts stated therein, and of the qualifications of the electors whose signatures are thus certified to be genuine, and the secretary of state shall consider and count only such signatures on such petitions as shall be so certified by said county clerks to be genuine: Provided, that the secretary of state may consider and count such of the remaining signatures as may be proved to be genuine, and that the parties so signing were legally qualified to sign such petitions, and the official certificate of a notary public of the county in which the signer resides shall be required as to the facts for each of such last named signatures; and the secretary of state shall further compare and

verify the official signatures and seals of all notaries so certifying with their signatures and seals filed in his office. Such notaries' certificates shall be substantially in the following form:

STATE OF OREGON,
County of ——, *ss:*

I, —— ——, a duly qualified and acting notary public in and for the above named county and state, do hereby certify: that I am personally acquainted with each of the following named electors whose signatures are affixed to the annexed petition, and I
42 know of my own knowledge that they are legal voters of the state of Oregon, and of the county and precincts written after their several names in the annexed petition, and that their residence and postoffice address is correctly stated therein, to-wit: (Names of such electors).

In testimony whereof I have hereunto set my hand and official seal this — day of ——, 19—.

—— ——,
Notary Public for Oregon.

The county clerk shall not retain in his possession any such petition, or any part thereof, for a longer period than two days for the first two hundred signatures thereon, and one additional day for each two hundred additional signatures, or fraction thereof, on the sheets presented to him, and at the expiration of such time he shall deliver the same to the person from whom he received it, with his certificate attached thereto, as above provided. The forms herein given are not mandatory, and if substantially followed in any petition, it shall be sufficient, disregarding clerical and merely technical errors.

SECTION 4. When any petition for the initiative or the referendum shall be filed with the secretary of state, he shall decide in the first instance whether or not the petition entitles the parties to have the measure referred to the people, under the provisions of section 1 of article IV of the constitution of Oregon, and either the
43 petitioners or the remonstrants, if any, may appeal to the supreme court of the state from the decision of the secretary of state, and the decision of the supreme court shall be final and conclusive upon the parties. The appealing party shall serve upon the secretary of state a written notice of the appeal from his decision, and the secretary of state shall thereupon transmit to the clerk of the supreme court a copy of his decision, together with such certified copies of the original papers and documents in the case as may be demanded by any of the parties.

SECTION 5. Immediately upon the filing of any such petition for the referendum or the initiative with the secretary of state, signed by the number of voters and filed within the time required by the constitution, he shall notify the governor in writing of the filing of such petition, and the governor shall forthwith issue his proclamation, announcing that such petition has been filed, with a brief statement

of its tenor and effect. Said proclamation shall be published four times in four consecutive weeks in one daily or weekly newspaper in each judicial district of the state of Oregon.

SECTION 6. The secretary of state, at the same time that he furnishes to the county clerks of the several counties certified copies of the names of the candidates for state and district offices, shall furnish to said county clerks his certified copy of the titles and num-
44 bers of the various measures to be voted upon at the ensuing general election, and he shall use for each measure a title designated for that purpose by the legislative assembly, committee, or organization presenting and filing with him the act, constitutional amendment, or petition for the initiative or the referendum: Provided, that such title shall in no case exceed twenty words, and shall not resemble any such title previously filed for any measure to be submitted at that election, which shall be descriptive of said measure, and he shall number such measures; and such titles shall be printed on the official ballot in the order in which the acts referred by the legislative assembly and petitions by the people shall be filed in his office. The affirmative of the first measure shall be numbered 300 and the negative 301, in numerals, and the succeeding measures shall be numbered consecutively 302, 303, 304, 305, and so on at each election. It shall be the duty of the several county clerks to print said titles and numbers upon the official ballot, in the order presented to them by the secretary of state, and the relative position required by law. Measures proposed by the initiative shall be designated and distinguished from measures proposed by the legislative assembly by the heading, "Proposed by Initiative Petition."

SECTION 7. The manner of voting upon measures sub-
45 mitted to the people shall be the same as is now required and provided by law; and no measure shall be adopted unless it shall receive an affirmative majority of the total number of effective votes cast on such measure and entitled to be counted under the provisions of this act; that is to say, supposing seventy thousand ballots to be properly marked on any measure, it shall not be adopted unless it shall receive more than thirty-five thousand affirmative votes.

SECTION 8. The secretary of state shall, not later than the first Monday of the third month next before any general election at which any proposed law or amendment to the constitution is to be submitted to the people, cause to be printed a true copy of the title and text of each measure to be submitted, with the number and form in which the question will be printed on the official ballot. The paper to be used for the covers of such pamphlets shall be twenty by twenty-five inches, and fifty pounds weight to the ream. The persons, committees, or duly authorized officers of any organization filing any petition for the initiative, but no other person or organization, shall have the right to place with the secretary of state for distribution, any pamphlets advocating such measure, not later than the first Monday of the fifth month before the regular general election at which the measure is to be voted on; any person, committee, or organization opposing any measure may place with the
46 secretary of state for distribution any pamphlets they may desire, not later than the first Monday of the fourth month

immediately preceding such election; as to pamphlets advocating or opposing any measure referred to the people by the legislative assembly, they shall be governed by the same rules of time, but they may be placed with the secretary of state by any person, committee, or organization: Provided, that all such pamphlets shall be furnished to the secretary of state in sheets of uniform size, as follows: Size of pamphlet page to be six inches wide by nine inches long; size of type page to be twenty-six ems pica wide by forty ems pica long, set in long primer or ten-point type, and printed on sized and supercalendered paper, twenty-five by thirty-eight inches, weighing fifty pounds to the ream. All such pamphlets shall be furnished to the secretary of state at the sole expense of the persons interested, and without cost to the state. In no case shall the secretary of state be obliged to receive any such pamphlets unless a sufficient number is furnished to supply one to every legal voter in the state, but in such case, he shall forthwith notify the persons offering the same of the number required. The secretary of state shall cause one copy of each of said pamphlets to be bound in with his copy of the measures to be submitted as herein provided. The title page of every such pamphlet shall show the official numbers for and against, and the ballot title of the measure to
47 which it refers, and whether it is intended to favor or oppose such measure, and by whom it is issued. The secretary of state shall distribute to each county clerk, before the second Monday in the third month next preceding such regular general election, a sufficient number of said bound pamphlets to furnish one copy to every voter in his county. Every registration officer, after the receipt by the county clerk of such pamphlets, shall deliver to every voter thereafter as he is registered, one copy of the same, and said registration and delivery shall be a part of the official duty of every officer who registers voters, and his registration fee or wages shall be full compensation for this additional service. The secretary of state shall not be obliged to receive or distribute any pamphlets advocating or opposing any measure unless the same shall be filed with him within the time herein provided.

SECTION 9. The votes on measures and questions shall be counted, canvassed, and returned by the regular boards of judges, clerks, and officers as votes for candidates are counted, canvassed, and returned, and the abstract made by the several county clerks of votes on measures shall be returned to the secretary of state on separate abstract sheets, in the manner provided by section 2833 of Bellinger and Cotton's Annotated Codes and Statutes of Oregon for abstracts of votes for state and county officers. It shall be the duty of the
48 secretary of state, in the presence of the governor, to proceed within thirty days after the election, and sooner if the returns be all received, to canvass the votes given for each measure, and the governor shall forthwith issue his proclamation, which shall be published in like manner as other proclamations herein provided for, giving the whole number of votes cast in the state for and against each measure and question, and declaring such measures as are approved by a majority of those voting thereon to be in full force and

effect as the law of the state of Oregon from the date of said proclamation.

SECTION 10. Every person who is a qualified elector of the state of Oregon may sign a petition for the referendum or for the initiative. Any person signing any name other than his own to any such petition, or signing the same more than once for the same measure at one election, or who is not at the time of signing the same a legal voter of this state, or any officer or any person willfully violating any provision of this statute, shall, upon conviction thereof, be punished by a fine not exceeding $500, or by imprisonment in the penitentiary not exceeding two years, or by both such fine and imprisonment, in the discretion of the court before which such conviction shall be had.

Passed the house February 12, 1903.

Passed the senate February 18, 1903.

Approved February 24, 1903.

Filed in the office of the secretary of State February 24, 1903.

(Here follows ballot marked p. 48*a*.)

EXHIBIT R

EXHIBITS

NOT

SUITABLE

FOR

MICRO-

FILMING

And on the — day of October, 1907, the plaintiff filed its

Demurrer

to the answer of the defendant, as follows:

(Title.)

Now comes the plaintiff, by A. M. Crawford, its attorney general, and John Manning, district attorney for the fourth judicial district of the state of Oregon, and:

I.

Demurs to the further answer of the defendant corporation to the complaint herein, and to the whole thereof, for the reason that it appears upon the face thereof that the new matter set forth therein does not constitute defense to the cause of action set forth in the complaint, nor to any part thereof.

II.

Plaintiff separately demurs to the new matter set forth in counts numbered one to twenty-three, both inclusive, in defendant's further answer to the complaint herein, for the reason that the facts therein contained do not constitute a defense to the complaint nor to any part thereof.

III.

Plaintiff separately demurs to the new matter set forth in counts numbered 24 to 29, both inclusive, in defendant's further answer, for the reason that the facts therein contained do not constitute a defense to the complaint nor to any part thereof.

Plaintiff separately demurs to each count of defendant's further answer to the complaint therein for the reason that the facts contained in any count thereof do not constitute a defense to the complaint nor to any part of the same.

And on the 9th day of March the court made an

Order

granting defendant's application to strike from its answer paragraphs 24, 25, 26 and 27 thereof; said order being in words and figures as follows:

(Title.)

This cause coming on to be heard upon the application of the defendant for leave to strike from the answer of the defendant paragraphs 24, 25, 26 and 27 of said answer, the plaintiff appearing by Hon. A. M. Crawford, attorney general of the state of Oregon, the

defendant appearing by Messrs. Carey & Kerr and Harrison Allen of counsel for defendant; and the court being sufficiently advised in the premises:

It is ordered and adjudged that the application to strike from said answer said paragraphs 24, 25, 26 and 27 be and the same is hereby granted.

And it further appearing to the court that a demurrer to
51 the answer herein was heretofore filed by the plaintiff in this behalf, by consent of plaintiff and defendant,

It is ordered and adjudged that said demurrer as filed shall stand as a demurrer to said paragraphs 24, 25, 26 and 27 eliminated.

Dated March 9, 1908.

By the Court,

JOHN B. CLELAND,
Circuit Judge.

And on the 9th day of March, 1908, a demurrer to the answer of the defendant was submitted, and the court made the following ruling thereon and entered a

Judgment

sustaining demurrer, etc., as follows:

(Title.)

Now at this time, this matter coming on to be heard upon the demurrer of the plaintiff to the answer of the defendant, the plaintiff appearing by A. M. Crawford, attorney general, and the defendant appearing by Carey & Kerr, and Harrison Allen, of counsel, and the court being fully advised in the premises:

It is hereby considered, ordered and adjudged that the demurrer be and the same hereby is in all things sustained.

And the defendant in open court announced that it declined to amend or plead further, but would stand upon its answer
52 whereupon, upon motion of plaintiff's attorney for judgment upon the complaint,

It is considered, ordered, and adjudged that the plaintiff have judgment in accordance with the prayer of its complaint, and that it have and recover of and from the defendant the sum of ten thousand four hundred fifty and 68-100 dollars ($10,450.68), and that execution issue therefor.

Whereupon the defendant in open court gave notice that it appealed from said judgment and the whole thereof to the supreme court of the state of Oregon, which said appeal was allowed by the court, and directed to be entered in the record.

Dated March 9, 1908.

By the court,

JOHN B. CLELAND,
Circuit Judge.

And on the 18th day of March, 1908, the defendant filed its undertaking on appeal which was duly served on the plaintiff-respondent.

Assignment of Errors.

And The Pacific Telephone and Telegraph Company, the defendant corporation and appellant herein, by its attorneys, says that in the record and proceedings in the within and foregoing entitled matter there is manifest error in this, to-wit:

I. That the circuit court of the state of Oregon, for Mult-
53 nomah county, erred in sustaining the demurrer to the answer of the appellant.

II. That the said court erred in holding that the people of the state of Oregon had authority to adopt, by popular vote, an alleged amendment to section 1 of article IV of the constitution of the state of Oregon, known as the "initiative and referendum amendment," pretending to reserve unto the people the power to propose laws and amendments to the constitution and to enact or reject the same at the polls, independent of the legislative assembly, and also reserving the power, at their own option, to approve or reject at the polls any act of legislative assembly. That said court erred in deciding that said pretended amendment to section 1, of article IV of the constitution of the state of Oregon was and is now in force.

III. That the said court erred in deciding that pursuant to said pretended amendment to section 1 of article IV of the constitution of the state of Oregon, the legislative assembly had authority to and did pass "An act making effective the initiative and referendum, and referendum provisions of section 1 of article IV of the constitution of the state of Oregon, and regulating elections thereunder, and providing penalties for the violation of the provisions of this act," which said act is designated in the answer herein as "Exhibit A," and that said act was, and is now, in force and effect.

54 IV. That the said court erred in deciding that pursuant to said pretended amendment to section 1 of article IV of the constitution of the state of Oregon, and pursuant to said pretended act making effective the initiative and referendum under the provisions of section 1 of article IV, a measure proposed by filing petitions with the secretary of state of the state of Oregon, requiring express, telephone and telegraph companies engaged in business within the state of Oregon, to pay a license tax of two per cent. upon their gross receipts, and fully set forth in the answer herein, was legally approved at a general election held in said state on the 4th day of June, 1906, or was legally approved by a majority of the votes cast at said election, or that the said proposed measure and the result thereof were promulgated by proclamation of the governor of said state, and published as chapter I of the laws of 1907 of the state of Oregon, and thereby became a law.

V. That the said court erred in deciding, under and by virtue of the provisions of said chapter I of the laws of 1907 of the state of Oregon, that the said Pacific States Telephone and Telegraph Com-

pany became or was liable to the state of Oregon in the sum of $9,500.62, taxes, or the sum of $950.05 as a penalty for failure to pay the sum of $9,500.62, or in any sum or amount.

55 VI. That the said court further erred in deciding that the said pretended initiative measure was or is a valid law of the state of Oregon, for the following reasons:

1. That at the time said pretended initiative measure was voted on as aforesaid, and at the time the same was promulgated by the governor of the state of Oregon as aforesaid, the legislative assembly of the state of Oregon was not in session.

2. That there was no session of the legislative assembly of the state of Oregon held between the month of February, 1906, and the month of January, 1907.

3. That said pretended initiative measure was not considered or enacted or published as a law or otherwise by the legislative assembly of the state of Oregon.

4. That said pretended initiative measure was not considered by or submitted to the deliberations of, or read before its pretended enactment by, and was not enacted by, any legislative or other representatives of the people, or of any part of the people, of the state of Oregon, or any legislative assembly or assemblies of representatives of the people, or of any part of the people, of the state of Oregon.

5. That said pretended initiative measure, before its pretended enactment, was not submitted to, or considered by and was not approved by, the governor of the state of Oregon, or any executive, or administrative, or other officer, or official, of the government of the state of Oregon, or any representative of the people, or of any part of the people, of the state of Oregon.

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6. That said pretended initiative measure was never introduced before or referred to or considered by or passed upon by, or in any way acted upon by any representatives of the people, or of any part of the people, of the state of Oregon, or by any officer or branch or department of the government of said state.

7. But said pretended initiative measure was enacted, so far as it has been enacted at all, wholly and solely by the direct vote of a majority of the voters of the state of Oregon voting at said election, and in the manner before stated, and not otherwise.

8. That said pretended initiative measure was proposed and voted on and promulgated as hereinbefore set forth, solely pursuant to the provisions and under the sole authority of said pretended amendment, and of said pretended act Exhibit "A," and not otherwise.

9. That said pretended initiative measure is null and void and of no effect because said pretended amendment and said pretended act Exhibit "A," if enforced, will render nugatory and will destroy the representative legislative assembly and the legislative power of the representative legislative assembly of the state of Oregon contrary to and in violation of the provisions contained in article I, section 2, and in article I, section 3, and in article I, section 4, and in article I, section 8, and in article IV, section 3, and in article IV, section 4, and in article V, and in article VI, of the constitution of the United States, and in article XIV of the amend-

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ments to the constitution of the United States, that the several states of the union shall create and maintain representative legislative assemblies; and because said pretended amendment and said pretended act Exhibit "A," are and each of them, is contrary to and in violation of the implied provision of the constitution of the United States that the government of the several states shall be representative in form and that the several states shall create and maintain representative legislative assemblies.

10. That said pretended initiative measure is null and void and of no effect because said pretended amendment and said pretended act Exhibit "A" purport, and each of them purports, to create and provide for a legislature, to-wit: A part of the voters of the state of Oregon not elected by the people of the state of Oregon and purport, and each of them purports, to abrogate the existence of electors for the most numerous branch of the legislature of said state, to-wit: a part of the voters of said state, thereby making impossible the determination of the qualifications necessary in the state of Oregon for electors of the members from said state of the house of repre-
58 sentatives of the United States, contrary to and in violation of the provisions of section 2, article I, of the constitution of the United States that the house of representatives shall be composed of members chosen every second year by the people of the several states, and that the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

11. That said pretended initiative measure is null and void and of no effect because said pretended amendment and said pretended act Exhibit "A" empower, and each of them empowers, a part of the voters of the state of Oregon, by their direct vote, to deprive, and purport, and each of them purports, to deprive the representative legislative assembly of the state of Oregon of the power to consent to the purchase by the congress of the United States of places in the state of Oregon for the erection of forts, magazines, arsenals, dockyards, and other needful buildings contrary to and in violation of the provisions of section 8, article I, of the constitution of the United States.

12. That said initiative measure is null and void and of no effect because said pretended amendment and said pretended act Exhibit "A" empower, and each of them empowers, a part of the voters of the state of Oregon, by their direct vote, to deprive and purport, and each of them purports, to deprive the representative legisla-
59 tive assembly of the state of Oregon of the power to prescribe the times, place and manner of the holding elections for senators and representatives in the congress of the United States, contrary to and in violation of the provisions of section 4, article I, of the constitution of the United States.

13. That said pretended initiative measure is null and void and of no effect because said pretended amendment and said pretended act Exhibit "A" empower, and each of them empowers, a part of the voters of the state of Oregon, by their direct vote, to deprive and purport and each of them purports to deprive representative legis-

lative assembly of the state of Oregon of the power to direct the man
ner in which the state of Oregon shall appoint electors for the elec
tion of the president and vice-president of the United States o
America, contrary to and in violation of the provisions of section 1
article XI of the constitution of the United States.

14. That said pretended initiative measure is null and void an
of no effect because said pretended amendment and said pretende
act Exhibit "A" empower, and each of them empowers, a part of th
voters of the state of Oregon, by their direct vote, to deprive and pu
port, and each of them purports, to deprive the representative legi
lative assembly of the state of Oregon of the power to consent to th
junction of the state of Oregon with one or more states o
60 parts of states of the union, contrary to and in violation of th
provisions of section 3, article IV, of the constitution of th
United States.

15. That said pretended initiative measure is null and void an
of no effect because said pretended amendment and said pretende
act Exhibit "A" empower, and each of them empowers, a part of th
voters of the state of Oregon, by their direct vote, to deprive, an
purport, and each of them purports, to deprive the representativ
legislative assembly of the state of Oregon of the power to apply
the United States for protection against domestic violence within th
state of Oregon, contrary to and in violation of the provisions o
section 4, article IV, of the constitution of the United States.

16. That said pretended initiative measure is null and void an
of no effect because said pretended amendment and said pretende
act Exhibit "A," empower, and each of them empowers, a part o
the voters of the state of Oregon, by their direct vote, to deprive, an
purport, and each of them purports, to deprive the representativ
legislative assembly of the state of Oregon of the power to apply
the congress of the United States for a convention for proposin
amendments to the constitution of the United States, and of th
power to ratify amendments proposed to the constitution of th
United States, contrary to and in violation of the provision
61 of article V, of the constitution of the United States.

17. That said pretended initiative measure is null and voi
and of no effect because said pretended amendment and said pr
tended act Exhibit "A" empower, and each of them empowers,
part of the voters of the state of Oregon, by their direct vote, to d
prive and purport, and each of them purports, to deprive the repr
sentative legislative assembly of the state of Oregon of the power
choose the senators from said state for the senate of the United Stat
contrary to and in violation of the provisions of section 3, of artic
I, of the constitution of the United States.

18. That said pretended initiative measure and said pretende
amendment and said pretended act Exhibit "A" are, and each o
them is, contrary to and in violation of the rights, privileges and im
munities of the defendant under and pursuant to the provisions o
section 4, of article IV, of the constitution of the United States, an
are, and each of them is, contrary to and in violation of the pr
visions of section 4, article IV, of the constitution of the Unite

States, and are, and each of them is, unrepublican and contrary to and inconsistent with and violative of a republican form of government, and therefore are, and each of them is, null and void and of no effect.

19. That said pretended initiative measure is null and void and of no effect because said pretended amendment and said pre-
62 tended act Exhibit "A" purport, and each of them purports, to provide for and pretend, and each of them pretends, to create a legislative body or legislature in the state of Oregon, to-wit: a part of the voters of said state prepared and empowered at all times and continuously to enact legislation contrary to and in violation of the provisions of section 3, article I, and of section 4, of article IV, of the constitution of the United States that the legislatures of the several states of the Union shall at times take a recess and shall from time to time meet and convene and be convened and adjourn, and contrary to and in violation of the provisions, and in derogation of the powers conferred upon the executive of the state of Oregon by the provisions of said section 3 of said article I, that the executive of a state may make temporary appointments to the senate of the United States during a recess of the legislature of said state, and of said section 4, of said article IV, that the executive of a state may apply to the United States for protection against domestic violence when the legislature cannot be convened.

20. That said pretended initiative measure is null and void and of no effect because said pretended amendment and said pretended act Exhibit "A" will, and each of them will, if enforced, create a legislature consisting wholly or in part of the voters of said state, acting as a legislature, or as a part of the legislature of said
63 state, without their election as legislators and solely by reason of, and in their capacity as voters.

21. That said pretended amendment and said pretended act Exhibit "A" purport and undertake, and each of them purports and undertakes, to confer upon a part of the voters of the state of Oregon, as such, a part or all of the power to choose the senators from said state for the senate of the United States, and to consent to the purchase by the congress of the United States of places in the state of Oregon for the erection of forts, magazines, arsenals, dockyards and other needful buildings, and to prescribe the times, places and manner of holding elections for senators and representatives in the congress of the United States, and to direct the manner in which the state of Oregon shall appoint electors for the election of the president and vice-president of the United States, and to consent to the junction of the state of Oregon with one or more states, or parts of states, of the Union, and to apply to the United States for protection against domestic violence within the state of Oregon, and to apply to the congress of the United States for a convention for proposing amendments to the constitution of the United States, and to ratify amendments proposed to the constitution of the United States contrary to and in violation of the provisions respectively of section 3, of article I, and of section 4 of article I, and of section 8 of
64 article I, and of section 1 of article XI, and of section 3 of article IV, and of section 4 of article IV, and of article V of

the constitution of the United States hereinbefore referred to, th
said powers shall be exercised by the legislatures, to-wit: Represent
tive legislative assembly of the several states, as hereinbefore
forth.

22. That said pretended initiative measure was not passed or e
acted or adopted or promulgated in accordance with due proce
of law as prescribed by section 1, of article XIV, of the amendmen
of the constitution of the United States, and that the pretend
license or tax upon this defendant, or upon its gross receipts, purpo
ing to be levied upon or assessed against defendant, or its gross r
ceipts, by said pretended initiative measure is not levied or assess
by due process of law, and if defendant be compelled to pay sa
pretended license or tax, defendant will be deprived of its proper
without due process of law, contrary to and in violation of the right
privileges and immunities of defendant under said section 1
article XIV of the amendments to the constitution of the Unite
States, and said pretended initiative measure denies to defenda
the equal protection of the laws, contrary to and in violation of th
rights, privileges and immunities of defendant under said section
of article XIV of the amendments of the constitution of the Unite
States.

65 23. That at the time the state of Oregon was admitted in
the Union by said act of congress, approved February 1
1859, as aforesaid, the state government and constitution of the sta
of Oregon were republican in form and in conformity with th
constitution of the United States, and said state of Oregon was
admitted to the Union upon the condition contained in said act
congress that the state government and constitution of the state
Oregon should be republican in form and in conformity with th
constitution of the United States; that, as hereinbefore set fort
said pretended amendment and said pretended act Exhibit "A" ar
and each of them is, unrepublican in form and not in conformit
with, but is contrary to, and in violation of, a republican form
government, and of the constitution of the United States, and co
trary to and in violation of the said act of congress, and the cond
tion of said act, approved February 14th, 1859, and contrary to an
in violation of the rights, privileges and immunities under said a
of congress of this defendant, a resident of said state of Oregon, an
duly incorporated under and by virtue of the laws of the said stat
and said pretended initiative measure, proposed and voted upon an
promulgated pursuant to the provisions of said pretended amen
ment and of said pretended act Exhibit "A" as aforesaid, is therefo
null and void and of no effect.

24. That said pretended amendment and said pretende
66 act Exhibit "A" empower, and each of them empowers,
part of the voters of the state of Oregon by their direct vo
to deprive and purport, and each of them purports, to deprive th
legislative assembly of the state of Oregon of the powers conferr
upon the legislative assembly of the state of Oregon by the prop
sitions made by the congress of the United States to the people
the state of Oregon, by section 4 of the act entitled: "An act for th

admission of Oregon into the Union," approved February 14th, 1859, regarding the use and disposition of the public lands and the salt springs and of the net proceeds of sales of public lands, and by the acceptance of said propositions by means of the act of the legislative assembly of the state of Oregon entitled: "An act relative to certain propositions made by the congress of the United States to the people of the State of Oregon," in effect September 2nd, 1859; and said pretended amendment and said pretended act Exhibit "A" purport and undertake, and each of them purports and undertakes, to confer upon a part of the voters of the state of Oregon as such, a part or all of said powers.

25. That said pretended amendment and said pretended act Exhibit "A" do, and each of them does, impair the obligation of the contract between the state of Oregon and the United States of America as contained in said act of congress, approved Feb-
67 ruary 14th, 1859, and in the acceptance of the propositions therein made by the congress of the United States to the people of the state of Oregon and accepted by the people of the state of Oregon, by said act of the legislative assembly of the state of Oregon, in effect September 2, 1859, to-wit: the contractual obligation of the state of Oregon to maintain a government republican in form and in conformity with the constitution of the United States, and to preserve to the legislative assembly of the state of Oregon the power to use and dispose of the public lands and the salt springs and the net proceeds of sales of public lands in the state of Oregon, contrary to and in violation of section 10, of article I, of the constitution of the United States that no state shall pass a law impairing the obligation of a contract, and said pretended initiative measure is therefore null and void and of no effect.

26. That said pretended initiative measure is null and void and of no effect because said pretended amendment and said pretended act Exhibit "A" purport, and each of them purports, to create within the state of Oregon a legislature, or a part of a legislature, to-wit: a part of the voters of the state of Oregon empowered to legislate, without taking the oath or affirmation required by Article VI of the constitution of the United States, and without taking the oath of office required by the act of congress approved June 1, 1789, section 1836 of the revised statutes of the United States, 1
68 Statutes at Large, 23, contrary to and in violation of said article VI of the constitution of the United States and of the provisions of said act approved June 1, 1789.

27. That said pretended initiative measure is null and void and of no effect because none of the voters of the state of Oregon voting on passage of said pretended initiative measure and in favor thereof, as hereinbefore set forth, did prior to so voting, take the oath or affirmation required by article VI of the constitution of the United States, or by the said act of congress approved June 1, 1789, contrary to and in violation of said article VI of the constitution of the United States, and contrary to and in violation of the provisions of said act.

28. That the authorized capital stock of this defendant exceeds $2,000,000; that under and by virtue of the provisions of an act of

the people of the state of Oregon and of the legislative assembly o
the state of Oregon, entitled: "An act to provide for the licensing
of domestic corporations and foreign corporations, joint stock com
panies and associations," etc., approved February 16, 1903, requiring
corporations doing business in the state of Oregon to pay an annua
license fee proportionate to their authorized capital stock, this de
fendant, prior to said pretended enactment of said pretended initia
tive measure purporting and undertaking to levy said tax upon th
gross receipts of this defendant, did pay and ever since ha
69 paid at the times and in the manner provided by law, a
annual license fee of $200; that in the manner and at th
times provided by law defendant, pursuant to the laws of the stat
of Oregon, did prior to said pretended enactment of said pretende
initiative measure pay, and has ever since paid, state, county an
school taxes levied in said state upon all of its property within th
state of Oregon, including its franchise to do the business in sai
state which said pretended initiative measure purports and under
takes to tax and which said taxes upon its said property, includin
its said franchise, have been and still are from time to time levie
and assessed against this defendant by the county of Multnomah, i
said state.

29. That said pretended initiative measure purporting and under
taking to levy said tax upon gross receipts of this defendant, is con
trary to and in violation of section 32 of article I of the constitutio
of the state of Oregon, which at all the times in this answer men
tioned, has provided, and still provides, as follows, to-wit: "No ta
or duty shall be imposed without the consent of the people, or thei
representatives in the legislative assembly, and all taxation shall b
equal and uniform," and said pretended initiative measure is there
fore null and void and of no effect.

30. That said pretended initiative measure is not a valid imposi
tion of a license or tax upon this defendant or upon its gros
70 receipts, or any part thereof, and there is no license due plain
tiff from defendant in any sum whatsoever, nor is there an
additional sum or any amount whatsoever due plaintiff from de
fendant for failure to pay the license referred to in the complaint
or any license, within the time stated in the complaint, or within o
at any time.

E. S. PILLSBURY,
CAREY & KERR, AND
HARRISON ALLEN,
Attorneys for Appellant.

71 & 72 *Index.*

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72½ And afterwards, on the 18th day of March, 1908, the following

Undertaking on Appeal

was filed:

(Venue & Title of Cause.)

Whereas, the defendant in the above entitled action appeals to the Supreme Court of the State of Oregon from the judgment made and entered against the defendant in the said action in the said Circuit Court in favor of the plaintiff in the said action on the 9th day of March, A. D. 1908, for ten thousand four hundred fifty and 68/100 dollars ($10,450.68):

Now, therefore, in consideration of the premises and of such appeal we, the undersigned, The Pacific States Telephone and Telegraph Company, a corporation organized and existing under the laws of the state of Oregon, and National Surety Company, a corporation organized and existing under the laws of the state of New York, and authorized to act as surety on bonds within the state of Oregon, do hereby, jointly and severally.

Undertake and promise on the part of the appellant that the said appellant will pay all damages, costs and disbursements which may be awarded against it on the appeal; and

Whereas, the appellant, The Pacific States Telephone and Telegraph Company, is desirous of staying execution of the said judgment so appealed from, we do further, in consideration thereof, and of the premises, jointly and severally

Undertake and promise that if the said judgment appealed from, or any part thereof, be affirmed, the appellant will satisfy it so far as affirmed.

Dated March 16, 1908.

THE PACIFIC STATES TELEPHONE
AND TELEGRAPH COMPANY.
By JNO. W. KILKYSON, *Div. Supt.*
NATIONAL SURETY COMPANY,
By JAS. McI. WOOD AND
J. COUCH FLANDERS,
Its Attorneys in Fact.

[Cor. Seal, N. S. Co.]

STATE OF OREGON,
County of Marion, ss:

Due service of within and foregoing undertaking on appeal is hereby acknowledged at Salem, Oregon, March 17, 1908.

A. M. CRAWFORD,
Of Attorneys for Plaintiff,
By I. H. VAN WINKLE.

73 In the Supreme Court of the State of Oregon.

STATE OF OREGON, Respondent,

v.

PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Appellant.

Appeal from the Circuit Court for Multnomah County—The Honorable John B. Cleland, Judge.

Argued and Submitted Jan. 5, 1909.

A. M. Crawford and A. S. Bennett, for Respondent. C. H. Carey, for Appellant.

Bean, J.

Affirmed.

* * * * * * *

Filed Feb. 2, 1909.

J. C. MORELAND, *Clerk.*
By —— ——, *Deputy.*

74 This is an action by the State against the Pacific States Telephone and Telegraph Company to recover two per cent. of the gross receipts of such Company for the year 1906. The case is as follows: In 1903 the legislature passed an act requiring all corporations, domestic and foreign, doing business in the State, to pay an annual license fee of from ten to two hundred dollars according to their capital stock (Laws 1903, 39). In 1906 there was proposed by an initiative petition and adopted by the people in June of that year, pursuant to the provisions of the initiative and referendum amendment to the Constitution, and without reference to the legislature, an act requiring telephone and telegraph companies to pay a license of two per cent. per annum on the gross receipts of the Company, and requiring such corporations to make annual statements to the state treasurer of the amount of such receipts as a basis for such tax. The defendant corporation is an Oregon concern and made the returns, required by the act, for the year 1906, but refused to pay the tax thereon, and hence this suit. It answered the complaint, denying liability on the grounds: (1) that the initiative act requiring it to pay such license or tax was never approved by the Governor, nor submitted to him for his approval; (2) that the defendant has paid the annual license fee required by the act of 1903, and also all state, county, and school taxes levied upon all of its property, "including its franchise to do business," and, therefore, the act of 1906 is unconstitutional and void because violative of § 32, Art I of the State constitution, requiring that "all taxation shall be equal and uniform"; (3) that the initiative and referendum amendment to the constitution, under which the act of 1906 was proposed and adopted, is unconstitutional and void, because repugnant to §§ 2, 3, 4, and 8 of Art. I; § 1 of Art. II, §§ 3 and 4 of Art.

IV; Art. V; Art. VI; and § 1 of the XIV amendment to the constitution of the United States; and also to the act of Congress of February 14, 1859, admitting Oregon to the Union, and the act approved June 1, 1789 (Rev. Stat. U. S. § 1836). Other grounds of objection are set forth in paragraphs 24, 25, 26 and 27 of the answer, but were stricken out on application of the defendant.

The plaintiff demurred to the new matter pleaded in the answer, on the ground that it did not constitute a defense to the cause
75 of action stated in the complaint. The demurrer was sustained, judgment rendered in favor of plaintiff and defendant appeals.

BEAN, *J.*:

The question whether an initiative measure is subject to the veto power of the governor was decided in *State v. Kline,* 50 Or. 426, and that case is conclusive here. What is said on the subject in *Kadderly v. Portland,* 44 Or. 118, 146, was in answer to the point, that the initiative and referendum amendment deprived the governor of a veto power over acts of the legislature and had no reference to measures proposed by the initiative. The annual license fee required by the act of 1903 to be paid by corporations is a business or excise tax on the right to be or exercise the powers of a corporation, and is in no sense a tax on property, nor is it a tax on the business or franchise which the corporation, when organized, may exercise: *Am. S. & R. Co. v. People,* 34 Col. 240; *Delaware* R. R. Tax, 18 Wall. 206; *Home Ins. v. New York,* 134 U. S. 594.

The right to be a corporation, or to do business as such, rests entirely within the discretion of the State, and it may, therefore, require it to pay a specified sum each year, or at stated intervals, for the privilege. The payment of such fee or tax, however, does not exempt the corporation from other forms of taxation. It may be also required to pay a tax on its tangible property and a tax on its intangible property or franchise, the latter to be in proportion to its income or measured in any other way the law making power may adopt: (27 Enc. Law. 832; 57 L. R. A. 98, note.)

"The State," says Mr. Justice Field, "may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation, or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the state; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction." 18 Wall. 231, *supra.*

See also *Maine v. Grand Trunk Ry. Co.,* 142 U. S. 217.

Among the elements of corporate taxable values are, the franchise; capital stock in the hands of the corporation; the tangible corporate property; and shares of stock in the hands of individual holders. And all of the authorities agree that a tax upon the franchise,

whether based on income or measured in some other manner,
76 and a tax on the tangible corporate property, is not double taxation: Cooley on Taxation, 406; *Commissioners v. Tabacco Co.* 116 N. C. 441; *Home Ins. Co. v. New York*, 117 U. S. 129; *Commonwealth v. New England State and Tile Co.*, 13 Allen, 391; *Commonwealth v. R. R. Co.* 150 Pa. St., 234; *Wil. Col. & Augusta R. R. Co. v. Board of Comm'rs of Brunswick Co.*, 72 N. C. 10; *State Tax Ry. on Gross Receipts*, 15 Wall. 284. Nor does the fact that plaintiff may have paid all taxes assessed and levied on its property, "including the value of its franchise" render invalid the law levying a tax on its gross income. At the time the assessment and levy alluded to were made, there was no law specifically requiring the franchise of a corporation to be assessed, nor providing the manner of estimating the value thereof, and clearly a law on the subject regularly enacted could not be rendered nugatory or invalid by local assessors including in the value of corporate property their estimate of the value of the franchise.

Whether the initiative and referendum amendment to the constitution is invalid, because repugnant to the provisions of the constitution of the United States, was thoroughly argued to and considered by this court in *Kadderly v. Portland*, and the views of the court as then and now entertained are indicated in the opinion filed in that case, and it is needless to restate them at this time.

It follows from these views that the judgment of the court must be affirmed and it is so ordered.

77 Be it remembered that at a regular term of the Supreme Court of the State of Oregon, begun and held at the court room in the City of Salem, on the first Monday, the 5th day of October, 1908. Present: Hon. Frank A. Moore, Chief Justice; Hon. Robert Eakin, Associate Justice; Hon. Robert S. Bean, Associate Justice, and J. C. Moreland, Clerk, the following proceedings were had on Tuesday the 2d day of February, 1909, the same being the thirty-eighth judicial day of said term:

STATE OF OREGON, Respondent,

vs.

PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Appellant.

Appeal from Multnomah County.

This cause having, on the 5th day of January, 1909, been duly argued and submitted to the court upon and concerning all the questions arising upon the transcript and record, and then reserved for further consideration. And the court having duly considered all the said questions, as well as the suggestions made by counsel in their argument and briefs, finds that there is not error as alleged. It is therefore ordered and adjudged by the court that the judgment of the court below in this cause rendered and entered, be and the same is, in all things affirmed.

And the said appellant having given an undertaking on appeal, and also as a stay, with the National Surety Company, as surety, it is ordered that the respondent recover off and from the appellant and said National Surety Company, its said surety, the sum of ten thousand four hundred and fifty dollars and sixty-eight dents ($10,450.68), with interest thereon since the 18th day of March, 1908, at the rate of six per cent. per annum, and its costs and disbursements in this court taxed at $

And it is further ordered that this cause be remanded to the court below from which this appeal was taken with directions to enter a judgment in accordance herewith.

78 In the Supreme Court of the State of Oregon.

PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Appellant,
vs.
STATE OF OREGON, Respondent.

Assignment of Errors on Writ of Error to the Supreme Court of the United States.

Now comes the Pacific States Telephone and Telegraph Company appellant in the above entitled cause, and plaintiff in error to the Supreme Court of the United States, by its attorneys, and files herewith its petition for writ of error, and avers and shows:

That in the records and proceedings of the above entitled cause, the Supreme Court of the State of Oregon erred to the grievous injury and wrong of the plaintiff in error herein and to the prejudice and against the rights of plaintiff in error, and for the purpose of having said proceedings in the above entitled cause reviewed in the Supreme Court of the United States, plaintiff in error presents the following assignment of errors and prayer for reversal of decision in the above entitled cause in this Court, by the Supreme Court of the United States:

First. The Supreme Court of the State of Oregon erred in affirming the judgment of the Circuit Court of the State of Oregon for Multnomah County sustaining the demurrer to the answer filed in the said Circuit Court of said County and State herein, and in not over-ruling said demurrer.

Second. The Supreme Court of the State of Oregon erred in rendering a judgment in favor of the plaintiff in said Circuit Court and defendant in error herein, and in not awarding a decree against said plaintiff and defendant in error herein, and in favor of the defendant and plaintiff in error herein.

79 Third. The Supreme Court of Oregon erred in holding and deciding that the alleged amendment to Section 1 of Article IV of the Constitution of the State of Oregon, known as the "Initiative and Referendum Amendment" pretending to reserve unto the people the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the Legis-

lative Assembly, and also reserving the power at their own option to approve or reject at the polls any act of the Legislative Assembly, was not contrary to and in violation of the following provisions of the Constitution of the United States namely:

(*a*) Art. 1, Sec. 2, Clause I:

"The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature."

(*b*) Art. 1, Sec. 3:

"The Senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof, for six years; and each senator shall have one vote."

(*c*) Art. 1, Sec. 4:

"The times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof."

(*d*) Art. 1, Sec. 8, Clause 17:

"The Congress shall have power * * * To exercise exclusive legislation * * * over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings."

(*e*) Art. II, Sec. 1, Clause 2:

"Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole
80 number of senators and representatives to which the state may be entitled in the congress."

(*f*) Art. IV, Sec. 3:

"New states may be admitted by the congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state, nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned, as well as of the congress."

(*g*) Art. IV, Sec. 4:

"The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence."

(*h*) Art. V:

"The congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the congress."

(*i*) Art. VI:

"This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

"The senators and representatives before mentioned, and
81 the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this constitution, but no religious test shall ever be required as a qualification to any office or public trust under the United States."

(*j*) XIV Amendment, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Fourth. The Supreme Court of Oregon erred in holding and deciding that said pretended Initiative and Referendum Amendment and the act of the legislature of the State of Oregon referred to in the answer in the cause in said Circuit Court of Multnomah County, in said state aforesaid, entitled, "An Act making effective the Initiative and Referendum Provisions of Section 1 of Article IV of the Constitution of the State of Oregon and Regulating Elections thereunder and providing penalties for violations of the provisions of this act" were not contrary to and in violation of the implied provision of the Constitution of the United States that the government of the several states shall be representative in form and that the several states shall create and maintain representative legislative assemblies.

Fifth. The Supreme Court of the State of Oregon erred in holding and deciding that said pretended Initiative and Referendum amendment was not contrary to and in violation of an act of Congress of February 14, 1859, admitting Oregon to the Union, the preamble of which is here quoted:

"Whereas, the people of Oregon have formed, ratified and
82 adopted a constitution of state government which is republican in form, and in conformity with the constitution of the United States, and have applied for admission into the Union on an equal footing with the other states; therefore,

"That, Oregon be, and she is hereby, received into the Union on an equal footing with the other states in all respects whatever, with the following boundaries:"

And by reason of the foregoing errors and holdings, the appellant and plaintiff in error prays that the said judgment may be reversed and that a mandate be issued directing that a decree be entered in favor of the appellant and plaintiff in error and for costs and dis-

bursements, and that it may be restored to all things which it h lost by reason of said judgment.

E. S. PILLSBURY,
CAREY & KERR,
HARRISON ALLEN,
Attorneys for Appellants and Plaintiff in Error.

PILLSBURY, MADISON & SUTRO,
Of Counsel.

(Endorsed:) In the Supreme Court of the State of Oregon. Pacif States Telephone & Telegraph Company, plaintiff & Appellant, v State of Oregon, defendant & Respondent. Assignment of error Filed April 5, 1909, J. C. Moreland, Clerk. E. S. Pillsbury, Care & Kerr, Harrison Allen, attorneys for appellant.

83 In the Supreme Court of the State of Oregon.

PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Appellant,
vs.
STATE OF OREGON, Respondent.

Petition for Writ of Error.

Comes now the above Pacific States Telephone and Telegrap Company, appellant, and shows: That heretofore and on the 2n day of February, 1909, a judgment was entered by the above name Supreme Court of the State of Oregon against your petitioner affirm ing the judgment and decree of the Circuit Court of the State o Oregon for Multnomah county in favor of the above named respond ent and defendant and against the above named appellant, as wi appear by the record and proceedings in the said cause, in whic decree and decision and the proceedings had prior thereto in thi cause certain errors were committed to the prejudice of the plainti and appellant, all of which will, in more detail, appear from the a signment of errors, which is filed with this petition.

Wherefore this plaintiff and appellant prays that a writ of erro issue in this behalf returnable in the Supreme Court of the Unite States for the correction of the errors complained of, and that a dul authenticated transcript of the record and proceedings in this cas may be sent to the Supreme Court of the United States.

E. S. PILLSBURY,
CAREY & KERR,
HARRISON ALLEN,
Attorneys for Petitioners.

PILLSBURY, MADISON & SUTRO,
Of Counsel.

84 STATE OF OREGON,
Supreme Court, ss:

Let the writ of error issue upon the execution of a bond by the Pacific States Telephone and Telegraph Company to the State of Oregon, in the sum of Twelve thousand Dollars; said bond, when approved, to act as a supersedeas.

Dated April 3d, 1909.

FRANK A. MOORE,
Chief Justice of the Supreme Court of the State of Oregon.

85 [Endorsed:] No. —. In the Supreme Court of the State of Oregon. Pacific States Telephone and Telegraph Company, Plaintiff and Appellant, *vs.* State of Oregon Defendant and Respondent. Petition for Writ of Error. Filed April 5, 1909. J. C. Moreland, Clerk. By —— ——, Deputy. E. S. Pillsbury, Carey & Kerr, Harrison Allen, Attorneys for Appellant.

86 In the Supreme Court of the United States.

PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Plaintiff in Error,

vs.

STATE OF OREGON, Defendant in Error.

Bond on Writ of Error.

Know all men by these presents that the Pacific States Telephone and Telegraph Company, a corporation, organized and existing under the laws of the State of Oregon as principal, and the National Surety Company, a corporation duly organized and existing under and by virtue of the laws of the State of New York, with its principal place of business at 115 Broadway in the City of New York, duly authorized to act as sole surety in the courts of the State of Oregon and of the United States, as surety, are held and firmly bound unto the above named State of Oregon in the sum of Twelve Thousand Dollars ($12,000.00) to be paid to it, to which payment well and truly to be made we bind ourselves and each of us jointly and severally, and our, and each of our heirs, executors, administrators, representatives, successors and assigns firmly by these presents.

Sealed with our seals this 3rd day of April, 1909.

Whereas the above named plaintiff in error seeks to prosecute its Writ of Error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the said Supreme Court of the State of Oregon:

Now therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute such Writ of Error to effect and answer all costs and damages that may be adjudged if

it shall fail to make good its plea, then this obligation shall be void, otherwise to be and remain in full force and effect.

87 PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY,
By W. J. PHILLIPS,
Division Commercial Superintendent.
CAREY & KERR, *Its Attorneys.*
NATIONAL SURETY COMPANY,
By JAS. McI. WOOD,
J. COUCH FLANDERS,
Its Attorney in Fact.

Attest:
[SEAL.] JAS. McI. WOOD,
Resident Assistant Secretary.

The above bond is approved this 3d day of April, 1909.
FRANK A. MOORE,
Chief Justice of the Supreme Court of the State of Oregon.

(Endorsed:) In the Supreme Court of the United States. Pacific States Telephone Company, plaintiff in error, *vs.* State of Oregon Defendant in error. Bond on writ of error from the Supreme Court of Oregon. Filed Apr. 5, 1909, J. C. Moreland, Clerk.

88 In the Supreme Court of the United States.

PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Plaintiff in Error,
vs.
STATE OF OREGON, Defendant in Error.

Writ of Error.

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Oregon, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Oregon, before you, or some of you, being the highest court of law or equity of the said State, in which a decision could be had in the said action between the State of Oregon, plaintiff and defendant in error, and the Pacific States Telephone and Telegraph Company, a corporation, defendant and plaintiff in error, wherein was drawn in question the validity of an amendment to the constitution of the State of Oregon, or statutes of, or an authority exercised under said state, on the ground of their being repugnant to the Constitution, or laws of the United States, and the decision was in favor of their validity, and was against the title, right, privileges or exemption specially set up or claimed under such clause of the constitution or statutes of the United States, and the title, right, privilege or ex-

emption specially set up or claimed under such sections of the constitution, statutes or commission; a manifest error hath happened to the great damage of the said Pacific States Telephone and Telegraph Company, as by its complaint appears;

89 We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 4th day of June next, in the said Supreme Court, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 5th day of April A. D. 1909.

[Seal United States Circuit Court, Oregon.]

G. H. MARSH,
Clerk of the Circuit Court of the United States
for the District of Oregon.
By G. W. MARSH, *Deputy.*

Allowed:

FRANK A. MOORE,
Chief Justice of the Supreme Court
of the State of Oregon.

90 [Endorsed:] No. —. In the Supreme Court of the United States. Pacific States Telephone and Telegraph Co., Plaintiff in Error, *vs.* State of Oregon, Defendant in Error. Writ of Error. Filed April 5, 1909. J. C. Moreland, Clerk Supreme Court State of Oregon. E. S. Pillsbury, Carey & Kerr, Harrison Allen, Attorneys for Defendant and Appellant.

91 UNITED STATES OF AMERICA, *ss:*

The President of the United States to State of Oregon, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within sixty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Oregon, wherein Pacific States Telephone and Telegraph Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Oregon this 5th day of April, 1909.

FRANK A. MOORE,
Chief Justice of the Supreme Court of the State of Oregon.

Attest:
J. C. MORELAND,
Clerk of the Supreme Court of the State of Oregon.

SALEM, OREGON, *April* 5, 1909.

I, attorney of record for the defendant in error in the above entitled cause, hereby acknowledge due service of the above citation and enter an appearance in the Supreme Court of the United States.

A. M. CRAWFORD,
Attorney General for the State of Oregon, Attorney for said State.

92 [Endorsed:] No. —. In the Supreme Court of the United States. Pacific States Telephone and Telegraph Company, Plaintiff in Error, *vs.* State of Oregon, Defendant in Error. Citation. Filed April 5, 1909. J. C. Moreland, Clerk Supreme Court State of Oregon. E. S. Pillsbury, Carey & Kerr, Harrison ——, Attorneys for Appellant.

93 STATE OF OREGON,
County of Marion, ss:

I, J. C. Moreland, Clerk of the Supreme Court of the State of Oregon, do hereby certify that the foregoing transcript is a full, true and complete copy of the record of said action certified to and filed with our said court, as the transcript on appeal from the judgment of the circuit court of the State of Oregon for the County of Multnomah, from which said appeal was taken, and is a copy of the Abstract of the record upon which said appeal was heard, and the judgment of our supreme court entered thereon on the 2nd day of February 1909.

I further certify that the foregoing transcript likewise contains a full, true and correct copy of the opinion filed, and upon which said judgment of our said supreme court was entered on the 2nd day of February, 1909.

I further certify that the Assignment of Errors and Prayer for Reversal, Bond on Appeal and its Approval, all of which are attached to the above and foregoing, have been by me compared with the originals thereof, and that they are true and correct copies of such originals as the same appear of record and on file in my office and in my custody.

I further certify that the Petition for Writ of Error and Allowance thereof, Writ of Error and allowance thereof, and Citation with service endorsed thereon, all of which are attached to the foregoing, are the original Petition for Writ of Error, Writ of Error,

and Citation lodged with and filed in my office, and that the foregoing transcript is a true and correct copy of the papers and pleadings filed and of the proceedings had in the above entitled cause in our said court as the same appears of record and on file in my office.

94 I further certify that the cost of the foregoing return to Writ of Error is $25.00 and that said amount was paid by Messrs. Carey & Kerr, Attorneys for the plaintiff in error.

In witness whereof, I have hereunto set my hand and the seal of the Supreme Court of the State of Oregon, at my office in the City of Salem, in said state, this 12th day of April 1909.

[Seal Supreme Court, State of Oregon, 1859.]

J. C. MORELAND,
Clerk of the Supreme Court of the State of Oregon.

95 UNITED STATES OF AMERICA,
Supreme Court of Oregon, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court, in the City of Salem, this 12th day of April, 1909.

[Seal Supreme Court, State of Oregon, 1859.]

J. C. MORELAND,
Clerk of the Supreme Court of the State of Oregon.

Endorsed on cover: File No. 21,618. Oregon supreme court. Term No. 822. Pacific States Telephone and Telegraph Company, plaintiff in error, *vs.* The State of Oregon. Filed April 21st, 1909. File No. 21,618.

5

FILED.
OCT 3 1911
JAMES H. McKENNEY,
CLERK.

In the Supreme Court

OF THE

United States

OCTOBER TERM, [redacted] 1911

[redacted]

PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY (a corporation),
Plaintiff in Error,

vs.

STATE OF OREGON,
Defendant in Error.

No. 36.

BRIEF FOR PLAINTIFF IN ERROR.

E. S. PILLSBURY,
OSCAR SUTRO,
Attorneys for Plaintiff in Error.

CAREY & KERR,
PILLSBURY, MADISON & SUTRO,
Of Counsel.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1908

No. 822

PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY (a corporation),
Plaintiff in Error,

vs.

STATE OF OREGON,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

This is an action brought by the State of Oregon, the defendant in error here, against the Pacific States Telephone and Telegraph Company, the plaintiff in error, a corporation formed under the laws of Oregon for the purpose of doing a telegraph and telephone business in that State and other States and Territories of the Pacific Coast, to recover a license tax on gross earnings,

claimed to have accrued for the period beginning Jun 26, 1906, and ending December 31, 1906.

The demand is for $10,450.66, alleged in the complain to be due under

> "an initiative law requiring express, telephone an telegraph companies to pay a license upon thei gross receipts, passed by a vote of the people Jun 4, 1906, and promulgated by proclamation of th Governor dated June 25, 1906, and published a Chapter One of the Laws of 1907." (Rec. p. 2.)

The defendant answered, denying liability on th ground that the said "Initiative Act", which was passe pursuant to the amendment of Section 1 of Article I of the Constitution of Oregon, providing for the initia tive and referendum, and under which the license ta was levied, is invalid because repugnant:

1. To the provisions of Article I, Section 2, Sectio 3, Section 4 and Section 8; Article II, Section 1; Articl IV, Section 3 and Section 4; Article V; Article VI, an to the 14th Amendment, Section 1, of the Constitution o the United States;

2. To the Act of Congress of February 14, 185 admitting the State of Oregon to the Union;

3. To the Act of Congress, approved June 1, 187 (1 Stat., At Large, 23, Rev. Stat., U. S., Section 1836).

Other grounds of objection to the Act, set forth i paragraphs 24, 25, 26 and 27 of the answer and arisin under the U. S. Postal Act, approved July 24, 1866 were stricken out on application of the defendant (Rec pp. 14-15-24) and are not to be considered; nor ar

certain other defenses pleaded in the answer and arising under the Constitution and Acts of the Legislature of Oregon relating to the taxation of real and personal property.

The plaintiff demurred to each of the remaining defenses by answer, on the ground that it did not constitute a defense to the cause of action stated in the complaint. The demurrer was sustained and judgment rendered as prayed for by the plaintiff.

Defendant appealed to the Supreme Court of Oregon and assigned as grounds of error, on such appeal, the failure of the lower Court to sustain each and all the defenses set up in the answer (Rec. pp. 25-32).

The Supreme Court of Oregon affirmed this judgment (Rec. pp. 34-37), 53 Or. 163 (99 Pacific 427), and the case comes to this Court on Writ of Error and upon an Assignment of Errors similar to all those urged in the Supreme Court of Oregon as to federal questions (Rec. pp. 37-40), and which are, in substance, that the "initiative" amendment of June 2, 1902, to the Constitution of Oregon, the Act of the Legislature of Oregon, approved February 24, 1903, to make this amendment effective, and the license tax measure under which this action was brought, passed by a vote of the people June 14, 1906, upon initiative petition pursuant to said amendment and Act of 1903, are invalid because they violate the Federal Constitution and the Acts of Congress invoked by the answer and specified in the said assignment of errors to this Court.

It follows that the real issue presented here is t
validity of the "initiative" amendment of June 2, 19
to the Constitution of Oregon and upon which depe
for their force the Act of 1903 of the Legislature
Oregon, making effective this initiative amendment, a
the license tax measure passed by a vote of the peo
of Oregon June 4, 1906, upon initiative petition pu
suant to said amendment and to the Act of 1903, a
which measure is the basis of the plaintiff's claim.

Before entering upon the argument, we quote, f
convenience, some constitutional provisions and statut
mentioned in the Assignment of Errors, and which w
be considered and referred to herein.

CONSTITUTION AND STATUTES OF OREGON.

Art. I, Sec. 21, Constitution:

> "No ex post facto law, or law impairing the ob
> gations of contracts, shall ever be passed, nor sh
> any law be passed, the taking effect of which sh
> be made to depend upon any authority, except
> provided in this constitution: provided, that la
> locating the capital of the state, locating coun
> seats, and submitting town and corporate acts, a
> other local and special laws, may take effect or n
> upon a vote of the electors interested."

Art. I, Sec. 32:

> "No tax or duty shall be imposed without the co
> sent of the people or their representatives in t
> legislative assembly; and all taxation shall be equ
> and uniform."

Art. III, Sec. 1:

> "The powers of the government shall be divid
> into three separate departments—the legislative, t

executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this constitution expressly provided."

Art. IV, Sec. 1 (prior to its amendment):

"The legislative authority of the state shall be vested in the legislative assembly, which shall consist of a senate and house of representatives. The style of every bill shall be 'Be it enacted by the Legislative Assembly of the State of Oregon', and no law shall be enacted, except by bill."

Art. IV, Sec. 1 (subsequent to its amendment in 1902):

"The legislative authority of the state shall be vested in a legislative assembly, consisting of a senate and house of representatives, but the people reserve to themselves power to propose laws and amendments to the constitution and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly. The first power reserved by the people is the initiative, and not more than eight per cent of the legal voters shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the Secretary of State not less than four months before the election at which they are to be voted upon. The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health or safety) either by the petition signed by five per cent of the legal voters, or by the legislative assembly, as other bills are enacted. Referendum petitions shall be filed with the Secretary of State not more than ninety days after the final

adjournment of the session of the legislative assembly which passed the bill on which the referendum is demanded. The veto power of the Governor shall not extend to measures referred to the people. All elections on measures referred to the people of the state shall be had at the biennial regular general elections, except when the legislative assembly shall order a special election. Any measure referred to the people shall take effect and become the law when it is approved by a majority of the votes cast thereon, and not otherwise. The style of all bills shall be: 'Be it enacted by the people of the State of Oregon.' This section shall not be construed to deprive any member of the legislative assembly of the right to introduce any measure. The whole number of votes cast for justice of the supreme court at the regular election last preceding the filing of any petition for the initiative or for the referendum shall be the basis on which the number of legal voters necessary to sign such petition shall be counted. Petitions and orders for the initiative and for the referendum shall be filed with the Secretary of State, and in submitting the same to the people he, and all other officers, shall be guided by the general laws and the act submitting this amendment, until legislation shall be specially provided therefor."

Act, approved February 24, 1903 (Rec. 17 to 22).

The Act of the Legislature of Oregon, approved February 24, 1903, to make the initiative amendment effective (Rec. pp. 17-22), provides, by Section 2, for the form of an initiative petition, to be addressed to the Secretary of State by any legal voters, demanding that a proposed law or amendment to the Constitution be submitted for approval or rejection at a designated general election, and by which petition each signer is required to make this statement only:

"I have personally signed this petition, and my residence, postoffice and voting precinct are correctly written after my name."

By Section 3, the county clerk of each county in which such a petition may be signed, shall compare the signatures of the electors so signing with their signatures on the registration books and certify as to their genuineness, and his certificate shall be *prima facie* evidence of the facts therein stated.

By Section 4, when the petition is filed with him, the Secretary of State shall decide, in the first instance, whether it be regular, and an appeal lies to the Supreme Court of the State from his decision in this respect.

Section 5 provides that immediately upon the filing of any such petition, as described, the Secretary of State shall notify the Governer, who shall, forthwith, issue his proclamation announcing that it has been filed, *with a brief statement of its tenor and effect,* and the same shall be published four times in four consecutive weeks in one daily or weekly newspaper in each judicial district of the State.

Section 6 requires the Secretary of State, at the time he furnishes the several county clerks with copies of the names of the candidates for State and district offices, to also furnish his certified copy of the titles and numbers of the various measures to be voted on at the ensuing general election, using for each constitutional amendment, or initiative or referendum act, a title designated for that purpose by the legislative assembly, committee, or organization filing the same, but such title shall in

no case *exceed twenty words,* nor resemble any such title previously filed for any such measure to be submitted at that election; and such titles shall be numbered and printed on the official ballot in the order the measures are filed.

Section 7 provides the manner of voting upon measures submitted to the people and declares that no such measure shall be adopted unless it receives a majority of the total number of effective votes cast thereon.

Section 8 of said Act reads as follows:

> "The Secretary of State shall, not later than the first Monday of the third month next before any general election at which any proposed law or amendment to the constitution is to be submitted to the people, cause to be printed a true copy of the title and text of each measure to be submitted, with the number and form in which the question will be printed on the official ballot. The paper to be used for the covers of such pamphlets shall be twenty by twenty-five inches, and fifty pounds weight to the ream. The persons, committees, or duly authorized officers of any organization filing any petition for the initiative, *but no other person or organization,* shall have the right to place with the Secretary of State for distribution, any pamphlets advocating such measure, not later than the first Monday of the fifth month before the regular general election at which the measure is to be voted on; any person, committee, or organization opposing any measure may place with the Secretary of State for distribution any pamphlets they may desire, not later than the first Monday of the fourth month immediately preceding such election; as to pamphlets advocating or opposing any measure referred to the people by the legislative assembly, they shall be governed by the same rules of time, but they may be placed with the Sec-

retary of State by any person, committee, or organization: Provided, that all such pamphlets shall be furnished to the Secretary of State in sheets of uniform size, as follows: Size of pamphlet page to be six inches wide by nine inches long; size of type page to be twenty-six ems pica wide by forty ems pica long, set in long primer or ten-point type, and printed on sized and supercalendered paper, twenty-five by thirty-eight inches, weighing fifty pounds to the ream. All such pamphlets shall be furnished to the Secretary of State *at the sole expense of the persons interested,* and without cost to the State. In no case shall the Secretary of State be obliged to receive any such pamphlets unless a sufficient number is furnished to supply *one to every legal voter in the State,* but in such case, he shall forthwith notify the persons offering the same of the number required. The Secretary of State shall cause *one copy of each of said pamphlets* to be bound in with his copy of the measures to be submitted as herein provided. The title page of every such pamphlet shall show the official numbers for and against, and the ballot title of the measure to which it refers, and whether it is intended to favor or oppose such measure, and by whom it is issued. The Secretary of State shall distribute to each county clerk, before the second Monday in the third month next preceding such regular general election, a sufficient number of said bound pamphlets to furnish one copy to every voter in his county. Every registration officer, after the receipt by the county clerk of such pamphlets, shall deliver to every voter thereafter as he is registered, one copy of the same, and said registration and delivery shall be a part of the official duty of every officer who registers voters, and his registration fee or wages shall be full compensation for this additional service. The Secretary of State shall not be obliged to receive or distribute any pamphlets advocating or opposing any measure unless the same shall be filed with him within the time herein provided." (Italics ours.)

CONSTITUTION AND STATUTES OF THE UNITED STATES.

Art. I, Sec. 2, Clause 1, Constitution:

"The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature."

Art. I, Sec. 3:

"The Senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof, for six years; and each senator shall have one vote."

Art. I, Sec. 4:

"The times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof."

Art. I, Sec. 8, Clause 17:

"The Congress shall have power * * * To exercise exclusive legislation * * * over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings."

Art. II, Sec. 1, Clause 2:

"Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the Congress."

Art. IV, Sec. 3:

"New states may be admitted by the Congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state, nor any state be formed by the junction of two or

more states, or parts of states, without the consent of the legislatures of the states concerned, as well as of the Congress."

Art. IV, Sec. 4:

"The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence."

Art. V:

"The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress."

Art. VI:

"This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

"The senators and representatives before mentioned and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this constitution, but no religious test shall ever be re-

quired as a qualification to any office or public trust under the United States."

XIV Amendment, Sec. 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Preamble, Act of Congress, February 14, 1859, admitting Oregon to the Union:

"Whereas, the people of Oregon have formed, ratified and adopted a constitution of state government which is republican in form, and in conformity with the constitution of the United States, and have applied for admission into the Union on an equal footing with the other states; therefore,

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

"That Oregon be, and she is hereby, received into the Union on an equal footing with the other states in all respects whatever, with the following boundaries, etc."

The Act of Congress, approved June 1, 1789, providing the form of oath or affirmation to support the Constitution of the United States to be administered to the members of the several State Legislatures and to all executive and judicial officers of the States.

(1 Stat. at Large, 23, Rev. Stat., U. S., Section 1836.)

Brief.

THE LICENSE TAX MEASURE IS VOID BECAUSE THE OREGON CONSTITUTIONAL AMENDMENT UNDER WHICH IT WAS "ENACTED" BY THE DIRECT VOTE OF THE PEOPLE, IS REPUGNANT TO THE FEDERAL CONSTITUTION.

PRELIMINARY.

The attack upon the validity of this measure involves the vital question whether or not the Government of a State may be directly administered by a numerical majority of its voters—or even possibly, by a minority.

The issue requires the Court to find whether under the Federal Constitution the whole people of an integral part of the Union may be ruled by force of numbers. It is not the question of mere majority rule which is at stake, for that principle involves the creation from *all* the people of a majority, to the rule of which *all* submit. What the initiative offers is government by the greatest number, in the determination of which the minority has, in reality, no part.

The basis of our institutions is that the people shall select those who perform the functions of government. In this selection each member of the commonwealth has a voice. The chosen administrators of the powers of government are no less the representatives of the whole people than of a part.

But under the principle of direct legislation, it is a numerical preponderance of voters which enacts the law for the whole. The voice of the minority is not heard in the preparation or enactment of such legislation. It is true that they may vote, but if outnumbered

their votes are of no value. They may argue but no one need listen.

The distinction was well stated by John Stuart Mill in his treatise on "Representative Government". At page 132 the learned author said:

> "The pure idea of democracy, according to its definition, is the government of the whole people by the whole people, equally represented. Democracy as commonly conceived and hitherto practiced, is the government of the whole people by a mere majority of the people, exclusively represented. The former is synonymous with the equality of all citizens; the latter, strangely confounded with it, is a government of privilege, in favor of the numerical majority, who alone possesses practically any voice in the State. This is the inevitable consequence of the manner in which the votes are now taken, to the complete disfranchisement of minorities.
>
> "The confusion of ideas here is great, but it is so easily cleared up, that one would suppose the slightest indication would be sufficient to place the matter in its true light before any mind of average intelligence. It would be so, but for the power of habit, owing to which the simplest idea, if unfamiliar, has as great difficulty in making its way to the mind as a far more complicated one. That the minority must yield to the majority, the smaller number to the greater, is a familiar idea; and accordingly men think there is no necessity for using their minds any further, and it does not occur to them that there is any medium between allowing the smaller number to be equally powerful with the greater, and blotting out the smaller number altogether. In a representative body actually deliberating, the minority must, of course, be overruled; and in equal democracy (since the opinions of the constituents, when they insist on them, determine those of the representative body) the majority of

the people, through their representatives, will outvote and prevail over the minority and their representatives. But does it follow that the minority should have no representatives at all? Because the majority ought to prevail over the minority, must the majority have all the votes, the minority none? Is it necessary that the minority should not even be heard? Nothing but habit and old association can reconcile any reasonable being to the needless injustice. In a really equal democracy, every or any section would be represented, not disproportionately but proportionately. A majority of the electors would always have a majority of the representatives; but a minority of the electors would always have a minority of the representatives. Man for man, they would be as fully represented as the majority. Unless they are, there is not equal government, but a government of inequality and privilege; one part of the people rule over the rest; there is a part whose fair and equal share of influence in the representation is withheld from them; contrary to all just government, but above all, contrary to the principles of democracy, which professes equality as its very root and foundation."

The same idea was expressed by Hamilton in the New York federal convention, using these words:

"Give all power to the many they oppress the few. Give all power to the few they will oppress the many. Both, therefore, ought to have the power that each may defend itself against the other."

Elliott's Debates, Vol. V, p. 203.

"We have passed from a mere democracy to a government of laws. We have surrendered the control of majorities to the domination of an agreement, by which all matters of state are to be determined. This agreement was not entered into for the purpose of protecting majorities, for they can

take care of themselves, but for the purpose of protecting minorities, even down to the least worthy citizen of the commonwealth."

Johnson "Free Government", p. 42.

And see, also,

De Tocqueville's "Democracy in America", Chap. XV,

where the great French publicist predicted that in unlimited authority of the majority lay the germ of the destruction of the free institutions of America.

In "Democracy and Empire" Franklin Henry Giddings, speaking of the maxim that a Government derives its power from the consent of the governed, shows that by "government" we can not mean the will of a majority; that by "justice" we can not mean the execution of such laws as the majority chooses to enact. The learned writer points out that if such were the true meaning of the maxim, governments so established could not be said to "exercise unjust powers when a majority coerces a minority".

It would mean, he says, that

"practically the test of moral government is nothing more than mere approval by human numbers".

Respecting such an interpretation he proceeds to show that

"in the ordinary exercise of its functions, a government must respect the rational convictions and the moral rights of all its subjects, whether—on questions of mere expediency—they be counted with a minority or with a majority. That this is a true

proposition, we have proof in the vast amount of attention with which, in our constitutional law, protection has been given to the rights of minorities, and even of individuals. The very limitation of the powers of governments, the positive prohibitions of certain forms of governments, the insistence upon a two-thirds or a three-fourths vote in the decision of various fundamental matters—all these are admissions that, in the performance of its functions, a government to the utmost possible extent should look for and secure the consent of the governed, even when the governed are in a helpless minority."

"Democracy and Empire", pp. 260-266.

In legislative assemblies the minority rarely, if ever, fails to moderate the wishes of the majority, however powerful. Reason and persuasion have their opportunity. But government by direct legislation is government by brute force. It is our contention that in this country laws cannot be so made.

"Law is something more than mere will exerted as an act of power", said this Court in *Hurtado v. California*, 110 U. S. 535. In the despotism of a monarch or of a mob this may not be true. But the Court was speaking of the laws of republics and of this country. In small communities direct legislation is not inconsistent with the opportunity for the whole people to be heard in the enactment of laws. But in the States of the Union, covering as they do vast areas, and containing millions of inhabitants, the privilege of popular assemblage for deliberation upon State matters would be a travesty upon the right of representation.

The result can only be that, without discussion, without the exchange of ideas or the enlightenment of argument, each voter, likely without even an understanding of the necessities or wishes of his neighbor, casts his vote and only force of numbers prevails, untempered perchance by reason or knowledge. It has been said that "law making includes the science of ethical compromises". The initiative puts an end to this theory of legislation.

Representation is the cardinal principle upon which rest our institutions. Tucker (Constitution of the U. S.) says:

> "Representation is the modern method by which the will of a great multitude may express itself through an elected body of men for deliberation in law making. It is the only practicable way by which a large country can give expression to its will in *deliberate legislation.*" (p. 87.)

Thomas Jefferson, one of the greatest exponents of democracy among the early statesmen of the country, recognized that the *republican form* of government, as developed in Virginia, Rhode Island, New York, New Jersey, Pennsylvania and other colonies, and which was adopted by the original States and carried into the Constitution of the United States, is essentially representative. Upon this subject he is thus recorded:

> "The equal rights of man and the happiness of every individual are now acknowledged to be the only legitimate objects of government. Modern times have the signal advantage too, of having discovered the only device by which these rights can be secured, to-wit: government by the people acting

not in person, but by representatives chosen by themselves."

Jefferson's Writings, Vol. 15, p. 482.

Also, at p. 452 of the same volume, as follows:

"You and I may differ occasionally in details of minor consequence, as no two minds, more than two faces, are the same in every feature. But our general objects are the same, to preserve the republican form and principles of our Constitution and cleave to the salutary distribution of powers which that has established. These are the two sheet anchors of our Union. If driven from either we shall be in danger of foundering."

And again he writes:

"A government is republican in proportion as every member comprising it has his equal voice in directing its concerns—not indeed in person, which would be impracticable beyond the limits of a city or small township, but by representatives chosen by himself and responsible to him at short periods."

In brief, a representative constitutional democracy.

Dr. Woodrow Wilson, in his very valuable book on "Constitutional Government in the United States", says (p. 191):

"A government must have organs; it cannot act inorganically, by masses. It must have a law-making body; it can no more make law through its voters than it can make law through its newspapers."

And commenting upon the only manner in which legislation can properly be accomplished, this learned author in the same work says further (pp. 104-5):

> "Common counsel is not aggregate counsel. It is not a sum in addition, counting heads. It is compounded out of many views in actual contact; is a living thing made out of the vital substance of many minds, many personalities, many experiences; and it can be made up only by the vital contacts of actual conference, only in face to face debate, only by word of mouth and the direct clash of mind with mind."

Professor Garner in his work "Introduction to Political Science", differentiates a pure democracy, such as the initiative would lead to, and a representative democracy, which is the republican form of government contemplated by the Federal Constitution, in this language:

> "Democracies are of two kinds—pure, or direct, and representative, or indirect. A pure democracy is one in which the will of the state is formulated and expressed directly and immediately through the people acting in their primary capacity. A representative democracy is one in which the state will is ascertained and expressed through the agency of a small and select number, who act as the representatives of the people. A pure democracy is practicable only in small states, where the voting population may be assembled for purposes of legislation and where the collective needs of the people are few and simple. In large and complex societies, where the legislative wants of the people are numerous, the very necessities of the situation make government by the whole body of citizens a physical impossibility."

And Hamilton, writing upon the same subject, says in the Federalist:

> "The difference most relied upon between the American and other republics consists in the prin-

ciple of representation; which is the pivot on which the former moves, and which is supposed to be unknown to the latter, or, at least, to the ancient part of them."

The right of every man to be heard in his own defense, in the defense of his life, liberty and property, is guaranteed by the Government of this country. Due process of law rests upon the law of notice to every man before he is deprived of any of the personal rights which are essential to the pursuit of happiness. But notice is but an idle form if with it goes not the right to be heard.

That this right is fundamental will not be gainsaid. It has been often recognized that legislation is the highest function of government. The effect of direct legislation is that in this department of government numbers alone will prevail, and a hearing by representation will be denied to the minority in the State. Such is not our system. The majority rules in the selection of representatives, but these represent *the whole people.*

The great significance of the question must be apparent. That it strikes at the foundations of our Government is certain. No republic can safely harbor tyranny. No tyranny is worse than that of an absolute majority. Bouvier calls it ochlocracy:

> "Government where the authority is in the hands of the multitude—the abuse of a democracy."

> "The trusteeship in the representative government is the only means yet discovered to temper the rashness of the democracy and overcome the obstinacy of monarchs."

> *Francis Lieber, "Civil Liberty and Self Government"*, Vol. I, p. 185.

The Rt. Hon. James Bryce, in speaking of the "tyranny of the majority" as any abuse by the majority of the powers which it enjoys in free countries under and through the law, says this

> "tyranny consists in the wanton or inequitable use of strength by the stronger, in the use of it to do things which one equal would not attempt against another. A majority is tyrannical when it *decides without hearing the minority,* when it suppresses fair and temperate criticism on its own acts, when it insists on restraining men in matters where restraint is not required by the common interest, when it forces men to contribute money to objects which they disapprove, and which the common interest does not demand." (Italics ours.)
>
> *Bryce's American Commonwealth,* Vol. II, p. 335 (3rd Ed.)

And the same eminent author and statesman declared the remedy for such tyranny to lie in this Court, which he denominated:

> "The living voice of the Constitution—that is, of the will of the people expressed in the fundamental law they have enacted. It is, therefore, as some one has said, the conscience of the people, who have resolved to restrain themselves from hasty or unjust action by placing their representatives under the restriction of a permanent law. It is the guarantee of the minority, who, when threatened by the impatient vehemence of a majority, can appeal to this permanent law, finding the interpreter and enforcer thereof in a court set high above the assaults of faction."
>
> Vol. I, pp. 272-3 (3rd Ed.).

The Federal Constitution aims to guarantee to every citizen of the United States, representation in government and the protection of a republican form of rule. The irresponsible despotism of the multitude has no place in our polity.

In *Hurtado v. California* (supra) Mr. Justice Matthews said:

> "Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both state and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government." (p. 536.)

In the republic these limitations bind all of the people as well as the Governments created by them. Each citizen of the commonwealth is entitled, as against all, to the enjoyment of those rights which are guaranteed to him by a republican form of government.

In *Luther v. Borden,* 7 How. pp. 29-30, Daniel Webster, speaking to the question of representative government, is reported to have said:

> "Let me state what I understand these principles to be. The first is, that the people are the source

of all political power. Everyone believes this. Where else is there any power? There is no hereditary legislature; no large property; no throne; no primogeniture. Everybody may buy and sell. There is an equity of rights. Anyone who should look to any other source of power than the people would be as much out of his mind as Don Quixote, who imagined that he saw things which did not exist. Let us all admit that the people are sovereign. Jay said that in this country there were many sovereigns and no subject. A portion of this sovereign power has been delegated to government, which represents and speaks the will of the people as far as they choose to delegate their power. Congress have not all. The State governments have not all. The Constitution of the United States does not speak of the government. It says the United States. Nor does it speak of State governments. It says the States, but it recognizes governments as existing. The people must have representatives. In England the representative system originated not as a matter of right, but because it was called by the King. The people complained sometimes that they had to send up burgesses. At last there grew up a constitutional representation of the people. In our system it grew up differently. It was because the people could not act in mass, and the right to choose a representative is every man's portion of sovereign power. Suffrage is a delegation of political power to some individual. Hence the right must be guarded and protected against force or fraud. That is one principle. Another is that the qualification which entitles a man to vote must be prescribed by previous laws directing how it is to be exercised, and also that the results shall be certified to some central power so that the vote may tell. We know no other principle. If you go beyond these, you go wide of the American track. One principle is that the people often limit their government; another, that they often limit themselves. They secure themselves against sudden changes by mere majorities."

And the late Chief Justice Fuller, delivering the opinion of this Court *In re Duncan,* 139 U. S. 449, after stating that:

> "By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their governments, National and State, have been limited by written constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities",

refers to *Luther v. Borden,* and says:

> "Mr. Webster's argument in that case took a wider sweep, and contained a masterly statement of the American system of government, as recognizing that the people are the source of all political power, but that as the exercise of governmental powers immediately by the people themselves is impracticable, they must be exercised by representatives of the people; that the basis of representation is suffrage; that the right of suffrage must be protected and its exercise prescribed by previous law, and the results ascertained by some certain rule; that through its regulated exercise each man's power tells in the constitution of the government and in the enactment of laws; that the people limit themselves in regard to the qualifications of electors and the qualifications of the elected, and to certain forms for the conduct of elections; that our liberty is the liberty secured by the regular action of popular power, taking place and ascertained in accordance with legal and authentic modes; and that the con-

> stitution and laws do not proceed on the ground of revolution or any right of revolution, but on the idea of results achieved by orderly action under the authority of existing governments, proceedings outside of which are not contemplated by our institutions." (pp. 461-2.)

And while it might be urged that, upon principle, the referendum is also obnoxious to the legislative function under a republican form of government, as impairing the responsibilities and duties of the Legislature, we are not required to discuss its scope and limitations in this case. One important difference between the referendum and the initiative is that the latter is possible only under the purest form of democracy, while the former may be used in a Government having *some* of the features of a republic. Cooley noted the distinction. He said:

> "*It is obviously impossible* that any considerable people should in general meeting consider, mature and adopt their own laws; but when a law has been perfected and it is deemed desirable to take expression of public sentiment upon it, or upon any other single question, the ordinary machinery of elections is adequate to the end and the expression is easily and without confusion obtained by submitting such law, or such question, for affirmative or negative vote."
>
> Constitutional Limitations, p. 896 (7th Ed.).

The issue here presented is, whether a State may, by amendment of its Constitution, provide for general legislation by the people without the intervention of representatives or a legislative assembly.

We are aware that the initiative method of legislation is claimed to be a check against corruption of legislators and misrepresentation of the people by their legislative assemblies; a panacea for the cure of those evils which accompany all representative government.

But in the government of the republic the end will not be the justification for the means. It were better that the struggle against abuse and corruption should continue than that they should be eradicated by theories and practices of government revolutionary in character and founded on error or injustice. And it would be difficult to discover how a community like that of Adams County, Ohio, could be benefited by the right of initiative legislation, though it might, perhaps, by the power to recall judges in some emergencies.

Direct legislation may be in accord with the wishes of the vast majority of one or several of the States. But that will not suffice to make it lawful. If it has no place in the organization of our Government, if its enforcement is a violation of the Constitution of the United States, the Courts must so declare, however great or small its popularity.

Finally, it may be observed that the supremacy of the Federal Constitution is invaded equally whether the Act be one that is hostile to the rights of persons claiming the protection of the laws or Constitution of the United States, or hostile to the organization or maintenance of the Federal Government. It is the conten-

tion here that initiative legislation is invalid on both grounds.

Government by direct legislation violates the express guaranty by the United States that in each State there shall be a republican form of government (Const. U. S., Art. IV, Sec. 4); it also violates the obligation of each State of the Union to maintain a republican form of government and the institutions which are inseparable from it, such as a representative Legislature, an executive and a judiciary. Such legislation also denies to a resident of a State, where it obtains, the equal protection of the laws and due process of law, as guaranteed by the 14th Amendment.

It is true that the relation of Federal to State authorities rests on the doctrine of expressed grant to the national government and reserved powers to the State. But the creation of the Union and the surrender of the powers necessary for the maintenance and operation of the Federal Government carried with them an acceptance of fundamental restrictions upon the forms of government which the States might adopt. Each State became limited to the adoption of principles of government consistent with the maintenance of the Union, with the existence of the national institutions, and with the exercise of the constitutional federal power.

By the initiative method the legislative branch of a State Government, designed to be equal in importance to the executive or judicial, is greatly lessened in efficiency,

the whole system as originally designed, is impaired and the equilibrium between these departments destroyed. One branch cannot be crippled without putting the whole structure in jeopardy.

The Constitution of Oregon, Art. III, Sec. 1 (ante), provides for three separate departments of government—legislative, executive and judicial—and declares that no person *charged with official duties under one,* shall exercise *any of the functions of another,* "except as in this Constitution expressly provided". Under the initiative amendment to that Constitution, a Governor or a Judge of the Supreme Court—any executive or judicial officer of the State—becomes a legislator if he votes for a law, as he can do under that amendment, and so exercises the legislative function. He might also propose laws. This illustrates how the three departments of government may thus become blended.

The extent to which initiative legislation, as it is now practiced in Oregon, subverts the principles of our Government is also illustrated by the practical elimination now taking place in that State, of the difference between statute law and constitutional provisions. Thus at the election of 1910 eleven constitutional amendments were submitted to the voters. It becomes apparent that one of the fundamental principles of our Government, namely, that a Constitution—in the nature of a bill of rights under which the people restrict themselves as to individual privileges for

the benefit of the mass—is a security for the stability of government, is likely to be overturned; for the Constitution of Oregon, under the initiative plan, may be changed as readily and frequently as the statutes, and by minorities of all the voters, because it is optional with the author of any initiative measure to determine whether it shall be presented as an amendment to the Constitution or a statutory enactment; the only practical difference being that the Legislature may repeal an objectionable statute, but a bad Constitutional amendment remains operative in any event until the next general election when, through the initiative, it may be abrogated by a majority of those voting upon that question.

Dr. Woodrow Wilson, in his scholarly work "The State", in criticising the tendency to adopt provisions in State Constitutions which are statutory in character, says:

> "The objections to the practice are as obvious as they are weighty. General outlines of organization, such as the Constitution of the United States contains, may be made to stand without essential alteration for long periods together; but in proportion, as constitutions make provisions for interests whose aspects must change from time to time with changing circumstances, they enter the domain of such law as must be subject to constant modification and adaptation. Not only must the distinctions between constitutional and ordinary law, hitherto recognized and valued, tend to be fatally obscured, but the much-to-be desired stability of constitutional provisions must in great part be sacrificed. Those constitutions which contain the lar-

> gest amount of extraneous matter, which does not concern at all the structure or functions of government, but only private or particular interests, must, of course, however carefully drawn, prove subject to most frequent change. In some of our States, accordingly, constitutions have been as often changed as important statutes. The danger is that constitution making will become with us only a cumbrous mode of legislation." (p. 475.)

It is an historical fact that the framers of the Constitution of the United States recognized that temporary expressions of the will of the people are often changed upon maturer consideration and that the fullest deliberation should attend all ultimate popular decisions; and the Constitution was framed to secure that result. It was their purpose that this great instrument should be changed for the gravest reasons only and after the most mature deliberation. The same considerations apply to State Constitutions.

The recall of judges and kindred propositions usually attend the adoption of the initiative, or follow closely after.

The leading argument made in favor of the initiative is that it will, in the nature of a reserve power, only be used on rare occasions as a restraint upon improper action by the Legislature, and such seems to be the view taken by the Supreme Court of Oregon in *Kadderly v. Portland*, 44 Or. 118 (74 Pac. 710), wherein it is suggested that the powers of the Legislature of Oregon are not materially curtailed by the initiative amendment which is here attacked.

But it does not matter to what extent the people may make use of the initiative, for where a provision or power is repugnant to or inconsistent with the Federal Constitution,

> "it is no answer that in the actual exercise of the power each party may, if he chooses, avoid a positive interference with the other.
>
> "The objection lies to the power itself, and not to the exercise of it. If it exist, it may be applied to the extent of controlling, defeating, or destroying the other. It can never be presumed that the framers of the Constitution, declared to be supreme, could intend to put its powers at hazard upon the good wishes or good intentions or discretion of the States in the exercise of their acknowledged powers."
>
> *1 Story on Constitution,* 342.

The argument is not only false in principle, but unfounded in fact. Thus the election records of Oregon show that in 1904 (the first general election after the initiative amendment was adopted), two measures were upon the ballot for proposed direct legislation; in 1906 eleven (among them the measure taxing the defendant); in 1908 nineteen—ten Constitutional amendments and nine proposed laws; in 1910 thirty-two—eleven Constitutional amendments and twenty-one laws. Twenty-four of these measures of 1910 had their origin by the initiative petition, which "shall include the full text of the measure proposed", and cannot be amended after the filing. At the end of this brief we print a copy of that portion of the

ballot which applies to these thirty-two measures and was used at that general election.

And in *Kiernan v. City of Portland,* 112 Pac. 402, the Supreme Court of Oregon recognizes and upholds the sovereign power of the people to control the Legislature by the initiative.

Investigation also shows that the greatest percentage of electors who have voted on any of these measures for direct legislation since the adoption of the initiative amendment, is 90 per cent of the total number voting at any one election and the smallest is 62 per cent of such number, making it possible to carry a measure by a vote of less than 32 per cent; and any one of them might have been carried by a minority of all the electors voting at any election when it was submitted. The principal interest touching initiative measures at the election of 1910, related to three of them affecting the sale of liquor and upon which a fraction of over 86, 89 and 90 per cent, respectively, of those voting for Governor at such election took action; a fraction over 80 per cent voted on the Woman's Suffrage amendment, and of the residue, three received between 75 and 80; twelve between 70 and 75; twelve between 65 and 70, and one a fraction over 60 per cent of all such voters.

Even in Switzerland, the original home of the initiative and the referendum, and to which their advocates make frequent reference, these innovations have not given satisfactory results. Mr. Albert Bushnell Hart,

a moderate and impartial observer, in his article "Vox Populi in Switzerland" writes:

> "I must own to disappointment to the use made by the Swiss of their envied opportunity. On the 20 referenda between 1879 and 1891 the average vote in proportion to the voters was but 58.5 per cent; in only one case did it reach 67 per cent; and in one case, the patent law of 1887, it fell to about 40 per cent in the Confederation and to 9 per cent in the Canton Schwyz. On the serious and dangerous question of recognizing the right to employment * * * only 56 per cent participated."

The foregoing general considerations seem pertinent as illustrating the argument against the constitutionality of direct legislation, and as indicating in a general manner the relative importance and the theoretical and practical significance of the fundamental change which the people of Oregon have attempted to introduce into their form of government.

Argument.

I.

THE INITIATIVE AND THE TAX MEASURE IN QUESTION ARE REPUGNANT TO THE PROVISIONS OF SECTION 1 OF THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, WHICH FORBIDS A STATE TO DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS.

The plaintiff in error is a corporation formed and existing under the laws of Oregon, and, therefore, entitled to invoke this provision of the Federal Constitution.

Smyth v. Ames, 169 U. S. 466-522;
Santa Clara County v. Southern Pacific Railroad, 118 U. S. 394-396;
Gulf, Col. & S. F. Ry. v. Ellis, 165 U. S. 150-154.

And this amendment controls the action of all branches of the Government, legislative, executive and judicial.

Ex parte Virginia, 100 U. S. 339-347;
Yick Wo v. Hopkins, 118 U. S. 356-373;
Scott v. McNeal, 154 U. S. 34-45;
Blake v. McClung, 172 U. S. 232.

By reference to the official statutes of Oregon for 1907, page 9, it appears that the initiative act under which the license tax is claimed in this suit was "enacted" by a vote of 69,635 in favor of the same and 6,441 against. The total vote for Governor at this election was 96,751, so that 20,675 of the electors did not vote on this measure. *The only other initiative act* for the imposition of a tax which has been "enacted"

by the voters of Oregon since the adoption of the constitutional amendment in question, is one voted on at the same election and being, An Act requiring Sleeping Car Companies, Refrigerator Car Companies and Oil Companies to pay an annual license tax upon gross earnings, and which was adopted by a vote of 70,872 for and 6,360 against the same (Statutes of Oregon, 1907, p. 12). Thus since the adoption of this amendment, all tax payers in Oregon except those mentioned in these two initiative acts, have been taxed up to the time this suit was begun, solely under laws passed by the Legislature of the State. To compel plaintiff in error to pay this tax would not accord to it the equal protection of the laws, nor the protection of equal laws, because this exaction is peculiar to plaintiff in error, and the few others included in these two Acts, and is based upon alleged legislation which, for said period, is *entirely different in character and in the manner of enactment, from that which pertains to the taxation of all other residents of the State who have only been subject to tax laws passed by the Legislative Assembly.*

We may pause here to consider that the enactment of laws for the purposes of taxation is essentially judicial in its character. Madison, in No. X of the Federalist, says upon this subject:

> "The apportionment of taxes on the various descriptions of property is an act which seems to require the most exact impartiality; yet there is, perhaps, no legislative act in which greater opportunity and temptation are given to a predominate party to trample on the rules of justice. Every

shilling with which they overburden the inferior number, is a shilling saved to their own pockets."

Hamilton's Works, Vol. XI, p. 72.

Under the initiative form of legislation the greatest opportunity and inducement are offered to a faction or ibal within a State to seek out certain interests, or asses, and impose upon them the principal burdens of axation, the object being, perhaps, to enlist the popular ote for their political purposes.

In *McCullough v. Maryland,* 4 Wheat., at p.* 427, Chief Justice Marshall, in speaking of the power of the Legislature to tax and the liability to unjust taxation, said:

> "The only security against the abuse of this power is found *in the structure of government itself.* In imposing a tax *the Legislature acts upon its constituents.* This is in general, a sufficient security against erroneous and oppressive taxation. The people of a State, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the *legislator,* and on the influence of the constituent over their *representative,* to guard them against its abuse." (Italics ours.)

It is apparent that in this expression the distinguished Chief Justice regarded a representative Legislature as the only law making body of a State under the fundamental plan of our Government as embodied in the Federal Constitution; and this view is enforced by his language in *Providence Bank v. Billings,* 4 Peters, at p.* 563, as follows:

> "The interest, wisdom and justice of the *representative body,* and *its relations with its constituents,* furnish the only security, when there is no express contract, against unjust and excessive taxation, as well as against unwise legislation generally." (Italics ours.)

And in *United States v. New Orleans,* 98 U. S., at p. 392, this Court, speaking by Mr. Justice Field, said:

> "The position that the power of taxation belongs exclusively to the legislative branch of the government no one will controvert. Under our system it is lodged nowhere else. But it is a power that may be delegated by the *Legislature* to municipal corporations, which are merely instrumentalities of the State for the better administration of the government in matters of local concern."

And in *Ex parte Virginia,* 100 U. S., p. 339, this Court, speaking by Mr. Justice Strong, said, at p. 347:

> "A State acts by its Legislature, its executive or its judicial authorities. It can act in no other way."

And representation and taxation must go together.

In *Harward v. St. Clair Drainage Co.,* 51 Ill., at p. 135, the Supreme Court of Illinois said:

> "The power of taxation is, of all the powers of the government, the one most liable to abuse, even when exercised by the *direct representatives* of the people; and if committed to persons who may exercise it over others without reference to their consent, the certainty of its abuse would be simply a question of time. No persons or class of persons can be entrusted with irresponsible power over the property of others, and such a power is essentially despotic in its nature, and violative of all just principles of government."

The plaintiff in error, a resident of Oregon, and entitled to the equal protection of its laws, is called on to pay this tax because eight per cent of the voters of that State have seen fit to set on foot a proposed law, without any of the discussion or deliberation incident to legislative bodies, *not even restrained by an oath,* and with no responsibility to any one for their acts. With the few exceptions mentioned, all other residents of the State have only been required during the period covered by this tax measure to pay such taxes as the Legislature has seen fit to impose under the restraints pointed out by Chief Justice Marshall in the foregoing citations and no one of them has been subjected to a tax upon gross earnings. It appears, moreover, that during this period the plaintiff in error paid to the State of Oregon an annual license fee, required by statute for the privilege of doing business as a corporation, and also paid all State, municipal and school taxes levied upon all of its property in the State, including its franchise to do business, and assessed by the proper officers, acting under laws passed by the Legislature (53 Or. 163).

Nor would it be necessary that this condition should actually exist in order that this Oregon constitutional amendment, and all attempted legislation thereunder, should be held to be without force. The fact that such consequences *might* ensue is sufficient to destroy their validity.

> "The test of the constitutionality of a statute is not what has been done but what by its authority may be done."
>
> *Ames v. People,* 26 Colo. 83, 56 Pac. 656.

This takes us back to the fundamental proposition that under our system of government, *there can be but one source of legislation, but one law making power in a State, and that power a Legislature chosen and acting as contemplated by the Federal Constitution.* With two sources of legislation in a State—in this instance wholly unlike in character and operation—there can be no equal rights, no equal protection, no equal laws; and no resident of such a State may rest upon the assurance of the equal protection of the laws.

Apart from all the other obvious advantages to the tax payer, arising from the investigation, discussion and deliberation incident to the usual manner of legislation, and of which he is deprived by this initiative method, we make special mention of the privilege of being heard before the law making body; a right always recognized and without which he is deprived of the equal protection of the laws. This right of the taxpayer to a hearing as to the amount of his tax, extends to the Legislature when the same is determined by that body.

Cooley on Constitutional Limitations, 7th Ed. 497-498;

2 Story on the Constitution, Sec. 1894.

The only distinction in this regard between the Legislature and an inferior body acting under its authority, is that with the former no notice is required, as all are bound to take notice of its sessions and proceedings. The right is reserved to the people, however, to present

their views to the Legislature, through petition or otherwise, on any subject in which they may be concerned.

U. S. v. Cruikshank, 92 U. S. 542-*552*;
State Tax-Law Cases, 54 Mich. 350-*382*.

If the Legislature of Oregon proposed to fix the rates which might be charged by plaintiff in error, as a public service corporation, there could be no question of its right to be heard in advance, as to the provisions of such a law; but under the initiative method an individual, or coterie, unrestrained by oath or otherwise, with the consent of eight per cent of the voters may file such a measure with the Secretary of State, even before the corporation is aware that it has been contemplated, and the same must then be submitted to vote as an entirety, no amendment thereto being possible. (*Home Telephone Co. v. Los Angeles,* 211 U. S. 265-*280*.) And while we desire and intend to always speak with respect of the individuals who have promoted the initiative movement in Oregon, and concede their motives to have been to subserve the public interests, it may be added that the person or persons drafting such a measure may not even be citizens of that State and may be inspired by a purpose wholly foreign to the accepted principles of legislation. Our position is that this movement, even though actuated by good intentions, is revolutionary and subversive of those fundamental principles of the Government which should be preserved as given by our fathers.

Mr. Justice Brown, in *Turpin v. Lemon,* 187 U. S., at p. 60, speaking for this Court said:

> "Under the fourteenth amendment, the Legislature is bound to provide a method for the assessment and collection of taxes that shall not be inconsistent with natural justice."

And in *Blake v. McClung,* 172 U. S., at p. 160, it was said for the Court, by Mr. Justice Harlan:

> "The fourteenth amendment controls the action of all branches of government—legislative, executive and judicial."

And aside from the fourteenth amendment the powers of taxation which might be exercised through initiative legislation, would be violative of the implied rights to the protection of property which pertain to every person under the Federal Constitution.

In *Loan Association v. Topeka,* 20 Wall, at pp. 662-63, Mr. Justice Miller, speaking of such rights, said:

> "It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognizes no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. * * * The theory of our government, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers. There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact

could not exist, and which are respected by all governments entitled to the name."

But we need not go so far in this case.

Our argument is illustrated and enforced by reference to an amendment to Article IX of the Constitution of Oregon, adopted upon initiative petition at the general election of 1910, and which reads:

> "Sec. 1-a. No poll or head tax shall be levied or collected in Oregon; no bill regulating taxation or exemption throughout the State shall become a law until approved by the people of the State at a regular general election; none of the restrictions of the Constitution shall apply to measures approved by the people, declaring what shall be subject to taxation or exemption and how it shall be taxed or exempted, whether proposed by the Legislative Assembly or by initiative petition; but the people of the several counties are hereby empowered and authorized to regulate taxation and exemptions within their several counties, subject to any general law which may be hereafter enacted."

By this amendment no measure passed by the Legislature, affecting taxation, can become a law until *approved by the people* at a regular general election, and *none of the restrictions of the Constitution apply to measures of taxation so approved* or initiated by the people; the only taxing function left to the Legislature is to submit proposed laws to be voted on by the people whose measures are released from all restrictions of the State Constitution, and who may initiate such laws for the regulation of taxation and exemptions as they see fit, disregarding the Legislature and the rule of

equality and uniformity if they wish, and arbitrarily exempting certain classes of persons and property altogether.

The consequences of such a system of taxation are obvious and need not be enlarged upon. The advocates and sponsors of this amendment, in their arguments therefor, asserted, in brief, that by its adoption the voters would take *into their own hands* the sole power to say by law:

1. What property shall be taxed and how it shall be taxed;

2. What property shall be exempt from taxation and how such exemptions shall be made;

and would grant

3. Limited home rule to the people of each county.

And in their affirmative argument in support of this amendment, which was passed to each voter with his ballot, they also claimed that its approval would, to use their own language, "give to the plain people and taxpayers of Oregon more bread and butter profits from the Government than they have ever had in the past". The vote on this amendment was 44,171 for and 42,127 against; the difference in its favor being 2044. The total vote for Governor at the same election was 117,690, being 31,392 greater than the entire vote on this amendment. It will be remembered that under the Oregon plan it is a majority of *those voting on a proposition,* not a majority of all the voters, which determines the

result; so that, under this rule, the amendment in question was adopted by a fraction over 37½ per cent of those voting at the same election for Governor.

The statement of the proceedings taken in Oregon under the initiative amendment since 1906, it is submitted, shows that with initiative taxation, and the resulting dual system of legislation within a State, there can be no equal protection of the law for persons or property, either in theory or in fact.

II.

THE INITIATIVE AMENDMENT AND THE TAX IN QUESTION LEVIED PURSUANT TO A MEASURE PASSED BY AUTHORITY OF THE INITIATIVE AMENDMENT VIOLATE THE RIGHT TO A REPUBLICAN FORM OF GOVERNMENT WHICH IS GUARANTEED BY SEC. 4 OF ART. IV OF THE FEDERAL CONSTITUTION.

1.

THE GUARANTY OF ARTICLE IV, SECTION 4, OF THE FEDERAL CONSTITUTION, IS TO THE PEOPLE OF THE STATES, AND TO EACH CITIZEN, AS WELL AS TO THE STATES AS POLITICAL ENTITIES.

The language of the provision is:

> "The United States shall guarantee to every State in this union a republican form of government," etc.

Ex necessitate rei, the guaranty is to the citizens of the States as well as to the States as political entities; nor is it a guaranty merely to the majority of the citizens of a State. It is entirely probable that those occasions on which the necessity for intervention by the Federal Government will be most acute, will arise when the Federal guaranty is invoked by the citizens of a State against the acts of an oppressive majority. It is likely that the protection of the Federal Government will be needed most when the State Government is in the hands of those who seek to deprive a helpless minority of its constitutional rights. Would the acquiescence of a State Government in the establishment of a despotism deprive protesting citizens of the aid of the Federal power? Would the acts of a dictator bind those

individuals who might appeal to the National Government? Would not the guaranty of a republican government be enforced? Would not the course of a willing majority in establishing an illegal form of government be checked upon the complaint of a single voter? These questions answer themselves. It is apparent that the assurance of Article IV of the Constitution is to every member of the Federal commonwealth, and protects him as well against the acts of his own State, or its people, as it protects the State itself against invasion or anarchy.

These considerations make it evident that the reserved powers of the States have further limitations than those expressed in the Federal Constitution; they illustrate the full meaning of the doctrine that the first section of the Fourteenth Amendment added nothing to the rights of the citizens of the United States (see *U. S. v. Cruikshank, infra*), the rights fundamental and implied, which no State, and which no people of a State, may override, rights which find their broadest expression in the guaranty of a republican form of government to the States and to all of the people of each State.

It will be conceded that with or without the consent of the lawfully constituted authorities of a State, with or without the consent of the voters of a State, no despot, no monarch, would be permitted to rule in any commonwealth within the nation. But all agree that the despotism of the multitude is as arbitrary and complete as the absolutism of a despot. Both may, if they choose, rule without reason; both account only to themselves; neither is responsible to the whole people. Nor could

it be contended that in the absence of the expressed guaranty of a republican form of government the matter would be otherwise. The right to a representative form of rule, to a government in which every subject shall be heard and represented, rests on broader grounds than the fourth clause of Article IV of our Federal Constitution. It is an inherent attribute of the citizenship of the United States, which no State or its people may impair.

In the message sent by President Taft to Congress on August 15, 1911, in which the recall provisions of the proposed Arizona Constitution were discussed, the President said:

> "Now, as the government is for all the people, and is not solely for a majority of them, the majority, in exercising control, either directly or through its agents, is bound to exercise the power for the benefit of the minority as well as the majority."

And again:

> "A popular government is not a government of a majority, by a majority, for a majority of the people. It is a government of the whole people, by a majority of the whole people under such rules and checks as will secure a wise, just and beneficent government for all the people."

Judge Jameson, in his work on Constitutional Conventions, Section 568, says the following:

> "From this it is apparent that a mere majority in number of all the citizens of a State, or of the electors of a State, have no right whatever to act for the whole State unless they can point to authority to that effect, express or implied in the

Constitution of the State, and that, if the action taken or proposed by such majority is palpably in the teeth of the constitutional provision, it is usurping and revolutionary."

No Court would compel obedience to the enactments of a hereditary legislature created by the vote, however overwhelming, of the people of a State, or of a hereditary committee, or of an individual with hereditary succession. In no essential feature would such a government violate more directly the principles of representation and of a republican form of government than does the organization of a pure democracy. It is against such violation that the provisions of Article IV, Section 4 of the Federal Constitution protect every person in the United States.

The meaning of the word "State", as used in clause 4 of Art. IV of the Constitution, was stated by Chief Justice Chase, in *Texas v. White,* 7 Wall. 730, as follows:

> "It is not difficult to see that in all these senses the primary conception (that is, of a state) is that of a people or community. The people, in whatever territory dwelling, either temporarily or permanently, and whether organized under a regular government, or united by looser and less definite relations, constitute the state.
>
> "This is, undoubtedly, the fundamental idea upon which the republican institutions of our own country are established."

Exemplifying the use of the word "State" to signify a political unit (as in the provision that prohibits the States from making treaties), or to signify a geographi-

cal division (as in the clause requiring the representatives in Congress to be inhabitants of the State where chosen), the Court continues:

> "And there are instances in which the principal sense of the word seems to be that primary one to which we have adverted, *of a people or political community, as distinguished from a government.*
>
> "*In this latter sense the word seems to be used in the clause which provides that the United States shall guarantee to every state in the Union a republican form of government,* and shall protect each of them against invasion.
>
> "In this clause a plain distinction is made between a state and the government of a state." (Italics ours.)

The guaranty, then, is to the people of Oregon; the people who by the act admitting Oregon to the Union "were invested with all the rights * * * of the "original thirteen States under the Constitution." *(Texas v. White, supra.)*

2.

SECTION 4 OF ARTICLE IV, THEREFORE, PROHIBITS THE MAJORITY IN ANY STATE FROM ADOPTING AN UNREPUBLICAN CONSTITUTION.

In examining into the history of this clause of the Constitution we find it first offered by Governor Randolph as the eleventh resolution submitted to the Federal Convention (*Elliott's Debates,* Vol. V, p. 128). It was then in the following form:

> "*Resolved.* That a republican government and the territory of each State, except in the instance of a voluntary junction of government and territory, ought to be guaranteed by the United States to each State."

It was amended by the Convention, on June 9th, to read:

> "That a republican constitution and its existing laws ought to be guaranteed to each State by the United States;" (*Ib.* V., p. 182).

and was so reported by the Committee of the Whole on June 13th (*Ib.* V, p. 190).

During the discussion of the resolution, as a part of the Committee's Report, Randolph said:

> "The resolution has two objects: first, to secure a republican government; secondly, to suppress domestic commotions; he urged the necessity of both of these provisions." (*Ib.* V, p. 333);

and later he

> "moved to add, as an amendment to the motion, *'and that no State be at liberty to form any other than a republican government'*. Mr. Madison seconded the motion.
>
> "Mr. Rutledge thought it unnecessary to insert any guaranty. No doubt could be entertained but that Congress had the authority, if they had the means, to co-operate with any State in subduing a rebellion. It was and would be involved in the nature of the thing.
>
> "Mr. Wilson moved, as a better expression of the idea, 'That a republican form of government shall be guaranteed to each State, and that each State shall be protected against foreign and domestic violence'.
>
> "This seeming to be well received, Mr. Madison and Mr. Randolph withdrew their propositions, and on the question for agreeing to Mr. Wilson's motion, it passed, Nemo. con."
>
> *Ib.* V, p. 333.

There is thus clear evidence from the authors of the provision that the clause was a direct prohibition against the adoption by any State of an unrepublican Constitution. And, as is pointed out in *Martin's Exrs. v. Martin, infra,* obedience to this inhibition is to be enforced equally with other restrictions on the powers of the States or of the people of the States.

The Supreme Court of Connecticut in a recent decision, speaking through Chief Justice Simeon E. Baldwin, says:

> "Our constitution (Article III, Section 1) vests the 'legislative power of this State' in the general assembly. That power covers the whole field of legitimate legislation, except so far as limitations are to be found in other provisions of this constitution or in that of the United States. The latter provides (Article IV, Section 4) that the 'United States shall guarantee to every state in this Union' a republican form of government. Connecticut is, therefore, impliedly bound forever to maintain such a form of government.
>
> "She put her legislative power in the hands of the general assembly. She put only, because she could put only, such power of that nature as was consistent with a republican form of government."
>
> *Appeal of Allyn,* 81 Conn. 534.

Mr. Cooley, in his work on "Constitutional Limitations", discussing the power of the people of a State to amend or revise their Constitution says that it is limited by the Constitution of the United States in these respects:

> "(1) It must not abolish the republican form of government, since such act would be revolutionary in its character, and would call for and demand

direct intervention on the part of the government of the United States.

"(2) It must not provide for titles of nobility, or assume to violate the obligation of any contract, or attaint persons of crime, or provide ex post facto for the punishment of acts by the courts which were innocent when committed, or contain any other provision which would, in effect, amount to the exercise of any power expressly or impliedly prohibited to the States by the Constitution of the Union. For while such provisions would not call for the direct and forcible intervention of the government of the Union, it would be the duty of the courts, both State and national, to refuse to enforce them, and to declare them altogether void, as much when enacted by the people in their primary capacity as makers of the fundamental law, as when enacted in the form of statutes, through the delegated power of their legislatures." (7th Ed., p. 62.)

In *Koehler v. Hill*, 15 N. W. 609, 60 Ia. 543, the Court said:

"It is well that the powers of the people and their relations to organized society should be understood. *No heresy has ever been taught in this country so fraught with evil as the doctrine that the people have a constitutional right to disregard the constitution, and that they can set themselves above the instrumentalities appointed by the constitution for the administration of law.* It tends directly to the encouragement of revolution and anarchy. It is incumbent upon all who influence and mould public opinion to repudiate and discountenance so dangerous a doctrine before it bears fruits destructive of republican institutions. It will be well if the people come to understand the difference between natural and constitutional freedom, before license becomes destructive of liberty. * * * (15 N. W. 615-6.) (Italics ours.)

> "We have approached and discussed this grave question with a full appreciation of the responsibilities which it involves, and we have given to its consideration the earnest attention which its importance demands. We have sought to maintain the supremacy of the constitution at whatever hazard. It is for the protection of minorities that constitutions are framed. Sometimes constitutions must be interposed for the protection of majorities even against themselves. Constitutions are adopted in times of public repose, when sober reason holds her citadel, and are designed to check the surging passions in times of popular excitement. But if courts could be coerced by popular majorities into a disregard of their provisions, constitutions would become mere 'ropes of sand', and there would be an end of social security and of constitutional freedom." (15 N. W. 630.)

Von Holst, at pages 236-7 of his "Constitutional Law of the United States of America", speaks of the restriction implied in the guaranty and says:

> "It not only promises the states that the Union will interpose with all its might on their behalf, if internal or external enemies threaten or overthrow their republican form of government, but it absolutely forbids them to adopt any other form of government under any conditions, or for any reasons whatever. The United States give a pledge to themselves and to their constituent members that they will always remain a republic and, indeed a federative republic."

The effect of the Constitution as a fundamental restriction upon the people of the States in the formation of their governments was fully appreciated by one of the most bitter opponents of the Constitution, Patrick Henry. Speaking in the Virginia Convention, he said:

"Suppose the people of Virginia should wish to alter their government; can a majority of them do it? No; because they are connected with other men, or, in other words, consolidated with other States. When the people of Virginia, at a future day, shall wish to alter their government, though they should be unanimous in this desire, yet they may be prevented therefrom by a despicable minority at the extremity of the United States. * * *

"This government is not a Virginian, but an American government."

Elliott's Debates, Vol. III, p. 55.

He was unquestionably correct in his analysis of the proposed Constitution. He saw but did not value the impending creation of a Union of which all the people would be citizens.

As is said by Black in his work on Constitutional Law, 2nd Ed., p. 262:

"In effect the guaranty does not only contain a promise to each State that it shall continue to enjoy a republican form of government as long as the Union endures, but it also imports a command to each State to maintain and preserve that form of government under penalty of the intervention of the federal union for the benefit of all its members."

In *Rice v. Foster,* 4 Harr. (Del.) 479, it was said:

"And although the people have the power, in conformity with its provisions, to alter the constitution, under no circumstances can they, so long as the Constitution of the United States remains the paramount law of the land, establish a democracy, or any other than a republican form of government." (p. 488.)

In *Minor v. Happersett,* 21 Wall. 162, the Court said, in speaking of the guaranty of a republican form of government in Article IV, Section 4:

"The guaranty necessarily implies a duty upon the part of the States themselves to provide such a government."

In *Martin's Exrs. v. Martin,* 20 N. J. Eq. 421, the Court of Chancery of New Jersey said (p. 423):

"A constitutional government, as distinguished from an absolute government or a despotism, is one limited in its powers. The powers conferred are sovereign, but not universal. It is not necessary to attain a good and efficient government, that the people to be governed should surrender all their natural rights to its dominion. That people is most free who surrender the fewest, and none but those necessary to attain the end. This maxim applies as well when the government is purely democratic, as when vested in a single and hereditary monarch. The despotism of a majority, when unjust, is as insufferable as that of a king. Constitutions are the only social compacts which have ever had actual existence and construing them usually consists in determining whether the power exercised in the case presented was conferred on the government.

"The Federal Constitution calls for another consideration. The sovereign power had before been vested in the state governments, with certain limitations. In all, there were many things over which neither the legislature nor any other department of government had power. The rights, over which no control was given, were reserved to the people, but were reserved to them individually. There was no power in the people as a body, as a grand democracy, by a vote of the whole, to invade these rights. When these were reserved they could not prohibit the free exercise of any religion, or affect the enjoyment of life, liberty, or property, by any bill of attainder, *ex post facto* law, or any direct vote, but only by due process of law. It is, therefore, no reason for holding that a power is conferred upon the national government, that such power would

> otherwise be destroyed, because there is provided no mode in which the people can exercise it. *Many powers, like the power to take the life, liberty or property at will, a power only of absolute despotism were not intended to be exercised by any one, but to be wholly annihilated.*" (Italics ours.)

The power of the majority of the people to impose upon a State a democratic form of government, or to adopt institutions violating the republican form, is one of the powers which, in the language of the Court, was not intended to be exercised by anyone "but to be wholly annihilated".

The Court likened the guaranty of a republican form of government to the constitutional prohibitions against the enactment of laws impairing the obligations of contracts, *ex post facto* laws, and of all acts which are inconsistent with the aims of both the State and Federal Governments, saying:

> "Such laws were well classed with bills of attainder and *ex post facto* laws, *and the prohibition was introduced into the Constitution on the same ground as the guaranty of a republican form of government to each state.* They were prohibited as inconsistent with that liberty and security which both state and national governments were designed to provide for." (pp. 426-7.) (Italics ours.)

And it is apparent that the right to a republican form of government is an attribute of citizenship, of at least equal dignity with the right of protection against bills of attainder, *ex post facto* laws and laws impairing contractual obligations and because it violates the right to government in the republican form the initiative method of legislation is unconstitutional.

III.

TAXATION BY THE INITIATIVE METHOD VIOLATES FUNDAMENTAL RIGHTS AND IS NOT IN ACCORDANCE WITH THE "LAW OF THE LAND" (U. S. Const., Art. VI).

Apart from the express guaranty of the Constitution, any "law" passed in contravention of the fundamental principles upon which our Government rests, any statute enacted without reference to the forms of government perpetuated in the States by the Federal Constitution, any act published as the will of the people in a manner other than through the medium of a representative assembly and elected legislators, that is, by a legislature such as the Federal Constitution implies and upon which the Federal Constitution is based, any such measure is not, we submit, enacted in accordance with, nor can its enforcement be in accordance with, the "law of the land" (U. S. Const., Art. VI).

As was said by Chief Justice Harrington:

> "An act which would subvert our republican form of government would violate the entire constitution and come in conflict with a provision of the Constitution of the United States which guarantees this form of government to each of the States."
>
> *State v. Allmond,* 2 Houst. 612, 639.

It is a familiar argument made by those who uphold the legality of direct legislation in this country, that, except in so far as the powers of government were surrendered to the National Government, the States reserved to themselves full and complete powers of government; that the people of a State, or the majority of

its people, or of its voters, have no restrictions upon their powers, except those contained in the Federal Constitution. This may be conceded, with the reservation, however, that a Government chosen by the majority of the people of a State must respect the rights of the whole people as citizens of the republic, and that every person within the jurisdiction of a State is entitled to full preservation, against invasion by a majority, of those rights which are secured to all by the Federal Constitution and by the form of government which it provides.

See, also,

Martin's Exrs. v. Martin, 20 N. J. Eq. 421;
Cooley, Const. Limitations (7th Ed., p. 62).

One of the main purposes of the Union was to invest the people of the several States with the national guaranty of certain rights and privileges. A dual citizenship was conferred, citizenship of the United States and of each State. This was the fundamental feature distinguishing the Constitution of the United States and the Union from the Articles of Confederation and the Confederation.

It was thought necessary, to

> "abolish the confederation and establish a federal republic in which the general government should act directly upon the people."
>
> *Fiske Critical Period American History,* 250.

The sovereign power of the States over their citizens is subordinate to the power of the National Government over its citizens.

See

Koehler v. Hill, supra.

"We are all citizens of the United States."

Crandall v. Nevada, 6 Wall. 35.

The people through the Constitution established a Government acting with

> "ample power directly upon the citizens, instead of the confederate government which acted, with its powers greatly restricted, only upon the States."
>
> *Lane County v. Oregon,* 7 Wall. 76.

Speaking of the Federal Government, Story says:

> "Its duties being moreover, imposed for the general benefit and security of the several states in their political character, and of the people both in their sovereign and individual capacity, if these objects be not obtained, the government does not answer the end of its creation. It is, therefore, bound to the several states, respectively, and to every citizen thereof, for the due execution of those duties; and the observance of this obligation is enforced under the solemn sanction of an oath from those who administer the government."
>
> *Story on the Const.,* Sec. 318, Vol. I, p. 227.

Wilson, in the Federal Convention, is reported as follows:

> "In explaining his reasons it was necessary to observe the two-fold relation in which the people would stand—first, as citizens of the general government; and secondly, as citizens of their particular state. The general government was meant for them in the first capacity; the state governments in the second."
>
> *Elliott's Debates,* Vol. V, p. 239.

In *U. S. v. Cruikshank,* 92 U. S. 542, this Court, speaking by Chief Justice Waite, said at page 549:

> "We have in our political system a government of the United States and a government of each of the several states. Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a state, *but his rights of citizenship under one of these governments will be different from those he has under the other.*" (Italics ours.)

The citizens of the United States receive from the Federal Government the protection of the rights which are conferred upon them by their national citizenship. The majority of the people of a State cannot, even by amendment of the State's organic law, encroach upon these privileges.

In *U. S. v. Cruikshank (supra),* in speaking of the right under the 14th Amendment to the equal protection of the laws, it was said:

> "*Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there.* The only obligation resting upon the United States is to see that the states do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty." (Italics ours.) (p. 555.)

Applying this language:

1. Legislation by representatives elected for that purpose is the distinguishing feature of a republican form of government.

2. The duty to provide a republican form of government "was originally assumed by the States; and it "still remains there". And the maintenance of the right is guaranteed to the people of the States by the National Government.

U. S. Const., Art. IV, Sec. 4;
Texas v. White, 7 Wall. 730.

3. Therefore, every citizen of the United States is entitled to the protection of the Federal Government in his right to be governed by laws enacted only by representatives elected for that purpose, and in accordance with a republican form of government. Such is the "law of the land".

U. S. Const., Art. IV, Art. VI.

Speaking of the phrase "the law of the land", the Court, in *University of Maryland v. Williams*, 9 Gill. & J. 365, said at p. 412:

> "By 'the law of the land' is meant, by the due course and process of the law (Co. Ins. in the commentary upon the same words in *Magna Charta*). The general law, prescribed and existing as a rule of civil conduct, relating to the community in general, judicially to be administered by courts of justice."

> "The words 'due process of law' were undoubtedly intended to convey the same meaning as the words 'by the law of the land' in Magna Charta."

Murray v. Hoboken Land Co., 59 U. S. 272.

Thus the constitutional provision entitling every person to the administration of a government in accordance with due process of law, i. e., the "law of the land" is (as has been pointed out in another part of the argument), a restraint alike upon the legislative, executive and judicial powers.

Murray v. Hoboken Land Co. (supra).

It is a restraint upon

> "the actions of the political body denominated a State by whatever instruments or in whatever modes that action may be taken".
>
> *Ex parte Virginia,* 100 U. S. 339.

Due process of law is such an exertion of the powers of the Government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe.

> *Ex parte Ah Fook,* 49 Cal. 402, quoting *Cooley, Const. Lim.*

It is here contended that no binding rule of conduct can be created, no law can be made, no tax can be levied, except in accordance with the settled forms of our republican Government. "Due process of law" means not only that there shall be a procedure sanctioned by the well-established principles of right and justice, but it must be a procedure prescribed by *law.* In *Allgeyer v. Louisiana,* 165 U. S. 578, Mr. Justice Peckham, speaking of the Act under consideration, said:

> "The statute which forbids such act does not become due process of law because it is inconsistent with the provisions of the Constitution of the Union."

The edicts of a multitude could not be the basis of due process, however fair the steps prescribed. Laws must emanate from the *law-making power,* and in a constitutional republic that power can only be a *representative* Legislature created in accordance with the organic law.

It is, of course, a well-settled general rule that the acts of a State Legislature will not be declared unconstitutional unless in violation of some constitutional provision. And the same principle must be applied to the acts of the States exercising their residuary sovereignty through any other of the departments of government, or through the people directly.

But the rule that acts will not be declared unconstitutional, unless an express provision of the Constitution is violated, is qualified.

Indeed, it has been frequently recognized that there are principles lying at the base of our Government which, though not expressed in the Constitution, may not be contravened—which Tiedeman describes as

> "the real, living constitutional law,—that which the people are made to feel around and about them, controlling the exercise of power by government, and protecting the minority from the tyranny of the majority—the flesh and blood of the Constitution", instead of "its skeleton", and which he said "is here, as well as elsewhere, unwritten".
>
> *Unwritten Const. of the U. S.*, p. 43.

These limitations upon the powers of the people of the States, and upon their Legislatures, are referred to in

Holden v. Hardy, 169 U. S. at p. 389.

Mr. Justice Brown there said:

"While the people of each State may doubtless adopt such systems of laws as best conform to their own traditions and customs, the people of the entire country have laid down in the Constitution of the United States certain fundamental principles to which each member of the Union is bound to accede as a condition of its admission as a State. Thus, the United States are bound to guarantee to each State a republican form of government, and the tenth section of the first article contains certain other specified limitations upon the power of the several States, the object of which was to secure to Congress paramount authority with respect to matters of universal concern. In addition, the Fourteenth Amendment contains a sweeping provision forbidding the States from abridging the privileges and immunities of citizens of the United States, and denying them the benefit of due process or equal protection of the laws.

"This court has never attempted to define with precision the words 'due process of law', nor is it necessary to do so in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defence. What shall constitute due process of law was perhaps as well stated by Mr. Justice Curtis in *Murray's Lessees v. Hoboken Land Co.*, 18 How. 272, 276, as anywhere. He said: 'The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. * * * To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be two-fold. We must examine the Constitution itself, to see

> whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

And see the language of this Court in *Loan Association v. Topeka*, 20 Wall. 655, *supra*.

In *C. W. & Z. R. R. Co. v. Commrs. of Clinton Co.*, 1 Ohio State 77, 87, the Court said:

> "The checks, balances and safeguards of that instrument (i. e., the Constitution) are intended no less for the protection and safety of the minority than the majority; hence while it continues in force, every citizen has a right to demand that his civil conduct shall be regulated by the associated wisdom, intelligence and integrity of the whole representation of the State."

In a discussion of direct legislation, in *Parker v. Commonwealth*, 6 Barr 507, it was said:

> "Unlike that of the United States, the government of Pennsylvania is not one of enumerated powers. Still it is a government of limited authority; and it is, therefore, not to be denied that the action of its legislature may be invalid, though it contravene no express provision of the Constitution, if it be in violation of the spirit of that instrument, and the genius of the public institutions designed to be created by it. Indeed, it is this species of insidious infraction that is more to be feared and guarded against than direct attacks upon any particular principle proclaimed as a part of the primordial law; for attempts of the latter description will, generally, be met by instant reprobation, while the stealthy and frequently seductive character of

the former is apt to escape detection, until the innovation is made manifest by the infliction of some startling wrong."

And see:

Maynard v. Bd. of Commrs., 84 Mich. 228, 239;
Comm. v. Moir, 199 Pa. 534; 53 L. R. A. 845.

In *People v. Hurlbut*, 24 Mich. 44, Judge Cooley, in an elaborate opinion, held that a State Legislature had no power to appoint municipal officers. The ruling was based on nothing expressed in the Constitution of the State of Michigan, but on the principles lying at the foundation of the American Government. Brushing aside minor objections to the statute, the learned Judge said:

> "These, however, are matters of secondary importance; there lies over and beyond these a question of the highest interest and concern, which cannot be answered without a careful scrutiny of the structure of our government, and an examination of the principles which underlie free institutions in America."

Pointing out that there were no specific restrictions imposed upon the legislative discretion with regard to the appointment of municipal officers, the opinion proceeds:

> "We must assume either an intention that the legislative control should be constant and absolute, *or, on the other hand, that there are certain fundamental principles in our general framework of government, which are within the contemplation of the people when they agree upon the written charter, subject to which the delegations of authority to the several departments of government have been made.*

That this last is the case, appears to me too plain for serious controversy. * * * The Constitution has been framed with these restrictions in view, and we should fall into the grossest absurdities if we undertook to construe that instrument on a critical examination of the terms employed, while shutting our eyes to all other considerations." * * *

"*The government of an oligarchy may be as just, as regardful of private rights, and as little burdensome as any other; but if it were sought to establish such a government over our cities by law, it would hardly do to call upon a protesting people to show where, in the constitution, the power to establish it was prohibited; it would be necessary, on the other hand, to point out to them where and by what unguarded words the power had been conferred. Some things are too plain to be written.* If this charter of State government, which we call a constitution, were all there was of constitutional command; if the usages, the customs, the maxims, that have sprung from the habits of life, modes of thought, methods of trying facts by the neighborhood, and mutual responsibility in neighborhood interests, the precepts which have come from the revolutions which overturned tyrannies, the sentiments of manly independence and self-control which impelled our ancestors to summon the local community to redress local evils, instead of relying upon king or legislature at a distance to do so—if a recognition of all these were to be stricken from the body of our constitutional law, a lifeless skeleton might remain; but the living spirit, that which gives it force and attraction, which makes it valuable and draws to it the affections of the people, that which distinguishes it from the numberless constitutions, so called, which, in Europe, have been set up and thrown down within the last hundred years, many of which, in their expressions, have seemed equally fair and to possess equal promise with ours, and have only been wanting in the support and vitality which these alone can give—this

> living and breathing spirit, which supplies the interpretation of the words of the written charter, would be utterly lost and gone. * * * The men who framed our institutions have not so understood the facts. With them it has been an axiom, that our system was one of checks and balances; that each department of the government was a check upon the others, and each grade of government upon the rest." (pp. 94, 97, 98, 106, 107.)

If the implied restrictions on the legislative power forbid the destruction of municipal self-government, are there no inherent prohibitions against the destruction of the republic? Nothing that forbids the planting of democracy in our Government? And if an oligarchy may not be established in this country, though no express prohibition of the Constitution forbids it, why is the case otherwise with a democracy? Each is equally unrepublican; each was equally hateful to the founders of our Government, and each is equally subversive of the structure which they erected.

In *Lexington v. Thompson* (Ky.), 57 L. R. A. 775; 68 S. W. 477, it is said:

> "So, Von Holst, Const. Law, 271, after stating the general rule that the legislative power of the state legislatures is unlimited so far as no limits are set to it by the federal or state constitution, proceeds: 'This does not mean, however, that these restrictions must always be expressed in explicit words. As it is generally admitted that the factors of the federal government have "certain implied powers", so it has never been disputed that the state legislatures are subject to "implied restrictions"; that is, restrictions which must be deduced from certain provisions of the federal or state constitutions, or that arise from the political nature

of the Union, from the genius of American public institutions.' * * * a constitution is 'not the beginning of a community, nor the origin of private rights. It is not the fountain of laws, nor the incipient state of government. It is not the cause, but consequence, of personal and political freedom. It grants no rights to the people, but is the creature of their power, the instrument of their convenience, designed for their protection in the enjoyment of the rights and powers which they possessed before the Constitution was made. It is but the framework of the political government, and necessarily based upon the pre-existing condition of laws, rights, habits, and modes of thought * * *

"'* * * Laws may be and have been declared invalid, although not repugnant to any express restriction contained in the fundamental law.'"

In *Downes v. Bidwell,* 182 U. S. 244, it is said by Mr. Justice White in his concurring opinion:

"Whilst, therefore, there is no express or implied limitation on Congress in exercising its power to create local governments for any and all of the Territories, by which that body is restrained from the widest latitude of discretion, it does not follow that there may not be inherent, although unexpressed, principles which are the basis of all free government which cannot be with impunity transcended. But this does not suggest that every express limitation of the Constitution which is appicable has not force, but only signifies that even in cases where there is no direct command of the Constitution which applies, *there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution.*" (pp. 290-1.) (Italics ours.)

And see:

Wilkinson v. Leland, 2 Pet. 657;
Terrett v. Taylor, 9 Cranch. 43;
Bradshaw v. Rogers, 20 Johns. 102;
Camp v. Rogers, 44 Conn. 291;
State v. Williams College, 9 Gill. & J. 365.

In a remarkably clear decision in the case of *The People v. Humphrey,* 23 Mich. 471, the Court held that the Legislature of Michigan could not authorize condemnation of lands for the use of the United States. Justice Cooley there said:

> "It may be said that there is no constitutional provision which expressly declares that the State shall have no authority to appropriate property for the public uses of the United States, and that the powers not prohibited may, on general principles, be exercised. But any such express prohibition would be an act of supererogation. All constitutions are subject to certain implications, which are as effectual limitations upon power as if expressly declared. *One of these is, that the constitution itself is made to define, limit and apportion the powers of the government it creates or controls, and not those of some other government or authority.*"

The opinion concludes in the following language:

> "For the reasons assigned, the legislation in question is void. *The enactments before us could not be adopted by the legislature, because not within the sphere of State powers. They, therefore, constitute an attempt to appropriate the property of individuals without due process of law;* and the State authorities were justified at any point in abandoning the proceedings taken under them." (pp. 481, 482, 483.) (Italics ours.)

It is claimed, therefore, that, apart from the guaranty clause, all citizens of the United States may demand government in conformity with republican principles.

The framers of the Constitution did not intend that its expressed provisions should be considered the full measure of the rights of the citizen.

In No. 84 of the *Federalist* Hamilton, in discussing the objection that the Constitution contained no bill of rights, showed that those natural rights which inhere in citizenship in a free republic, require no expression in a written instrument. Speaking of the absence of an express guaranty of the liberty of the press, he said:

> "Its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and the government, and here, after all, as is intimated on another occasion, must we seek for the only solid basis of all our rights."
>
> *XII Hamilton's Works,* p. 327.

> "Bills of attainder, *ex post facto* laws and laws impairing the obligations of contracts are contrary to the first principles of the social compact, and of every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters."
>
> Madison, *"Federalist"* No. 44. *XI Hamilton's Works,* p. 370.

The adoption of the ten amendments undoubtedly facilitated the approval of the Constitution, but the amendments were widely considered unnecessary.

As was said by Nicholas, in the Virginia Convention, in discussing the Federal Constitution and before the adoption of the first ten amendments:

> "A bill of rights is only an acknowledgment of the pre-existing claim to rights in the people. They belong to us as much as if they had been inserted in the Constitution."
>
> *Elliott's Debates,* Vol. III, p. 451.

In *Minor v. Happersett,* 21 Wall. 161, the Court, speaking by Chief Justice Waite, said of the 14th Amendment, p. 171:

> "The amendment did not add to the privileges or immunities of a citizen."

In *U. S. v. Cruikshank (supra)* it was said:

> "The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances or for anything else connected with the powers or duties of the National government, is an *attribute of National citizenship* and as such under the protection of and guaranteed by the United States. The very idea of government republican in form implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs, and to petition for a redress of grievances. If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the Statute and within the scope of the sovereignty of the United States." (p. 552.)

Speaking of the "due process" clause of the 14th Amendment, Chief Justice Waite said that it

> "adds nothing to the rights of one citizen as against another. It simply furnishes an additional guar-

> anty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society." (p. 554.)

So the Court, speaking of the provision for the equal protection of the laws, said:

> "This provision does not, any more than the one which just precedes it, and which we have just considered, add anything to the rights which one citizen has under the Constitution against another. The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle if within its power." (pp. 554-555.)

If the right of petition is an attribute of national citizenship and implied in the constitutional provision for a republican form of government, is not the right of government by representation likewise such an attribute and likewise so implied?

Is the right to government by representation not a principle of republicanism? And if so, is it not the bounden duty of the government to protect that right? If the 14th Amendment was not needed to add the right of equal protection to the rights of the citizens of the republic, is an amendment to the Constitution needed to entitle citizens to government by representation? Can due process of law in this country rest in any other form of government?

IV.

THE INITIATIVE IS IN CONTRAVENTION OF A REPUBLICAN FORM OF GOVERNMENT. GOVERNMENT BY THE PEOPLE DIRECTLY IS THE ATTRIBUTE OF A PURE DEMOCRACY AND IS SUBVERSIVE OF THE PRINCIPLES UPON WHICH THE REPUBLIC IS FOUNDED. DIRECT LEGISLATION IS, THEREFORE, REPUGNANT TO THAT FORM OF GOVERNMENT WITH WHICH ALONE CONGRESS COULD ADMIT A STATE TO THE UNION AND WHICH THE STATE IS BOUND TO MAINTAIN.

1.

DIFFERENCE BETWEEN A REPUBLIC AND DEMOCRACY.

The difference between the republican and democratic forms of government is that in the former the people rule by their representatives elected for that purpose; in the latter the people themselves exercise the powers of government directly.

Webster defines a republic to be:

> "A state in which the sovereign power resides in the whole body of the people, and is exercised by representatives elected by them."

This definition was adopted by this Court in *Downes v. Bidwell,* 182 U. S. 279.

A democracy Webster defines as:

> "A government by the people; a form of government in which the supreme power is retained and directly exercised by the people."

Cooley says of a republican form of government:

> "A government in the republican form; a government by representatives chosen by the people."
>
> *Cooley's Const. Lims.,* p. 194.

And see:

Minor v. Happersett, 21 Wall. 162;

In re Duncan, 139 U. S. 461, *supra;*

Jefferson Writings, vol. 15, p. 452, *supra.*

"A republican government is above all things representative government."

Burgess, Pol. Science and Compar. Const. Law, Vol. I.

In *Black's Constitutional Law,* at p. 28, the following distinction is drawn:

"The system of government in the United States and in the several states is distinguished from a pure democracy in this respect, that the will of the people is made manifest through representatives chosen by them to administer their affairs and make their laws, and who are intrusted with defined and limited powers in that regard, whereas the idea of a democracy, non-representative in character, implies that the laws are made by the entire people acting in a mass-meeting or at least by universal and direct vote."

"Representation is one of the very essentials of a republican form of government."

Bartlett Digest Election Cases, 446.

"Ours is a government of division and distribution of powers and authority. Ours is also a representative democracy; that is, it is republican in form of government as contradistinguished from a social or pure democracy on one hand and a government by the minority on the other, and excludes all others save and except one by the people through their selected representatives."

Ex parte Farnsworth, 135 S. W. 537.

Story says:

"In absolute governments the whole executive, legislative and judicial powers are, at least in their final result, exclusively confined to a single individual; and such a form of government is denominated a despotism, as the whole sovereignty of the state is vested in him. If the same powers are exclusively confided to a few persons, constituting a permanent sovereign council, the government may be appropriately denominated an absolute or despotic aristocracy. If they are exercised by the people at large in their original sovereign assemblies, the government is a pure and absolute democracy. But it is more common to find these powers divided, and separately exercised by independent functionaries, the executive power by one department, the legislative by another, and the judicial by a third; and in these cases the government is properly deemed a mixed one; a mixed monarchy, if the executive power is hereditary in a single person; a mixed aristocracy, if it is hereditary in several chieftains or families; and a mixed democracy or *republic*, if it is delegated by election, and is not hereditary." (Italics ours.)

1 Story on the Constitution, p. 388.

And see

Ex parte Anderson, 134 Cal. 74, *infra*.

Geo. H. Yeamans, in "The Study of Government", says of a pure democracy:

"It is natural and correct that, as above described and as generally understood, a pure democracy should be by common consent pronounced wholly impracticable for any but a very limited extent of territory, and to be, within that limited extent, a most fickle and turbulent government given alternately to the domination, often to the hates and passionate of tyranny, of factions. A better name would be simple democracy, or mass

democracy, without recourse to the offensive epithet of mobocracy."

It is apparent from the foregoing definitions that the direct exercise of the powers of government by the people at large would remove from a republic the feature which distinguishes it from a democracy. That government cannot be said to be representative in which the people at large are the legislators.

People v. Collins, 3 Mich. 343, 399;
State v. Swisher, 17 Tex. 441;
Rice v. Foster, 4 Harr. 479;
Ex parte Wall, 48 Cal. 279;
State v. Harris, 2 Bailey 598.

The principle of government by representatives elected by the people was the controlling factor that shaped the creation of our government. It was the main argument in justification of the proposed plan. It was the answer to the doubts of those who could see in a vast government by the people only turbulence and disorder and oppression. It was the reason for calling it a republic, "the compound republic of America".

Federalist, No. 51.

2.

IN ASCERTAINING THE MEANING OF THE PHRASE "REPUBLICAN FORM OF GOVERNMENT" THE DEBATES OF THE CONSTITUTIONAL CONVENTIONS AND THE FEDERALIST PAPERS ARE OF GREAT IMPORTANCE, IF NOT CONCLUSIVE.

It is a familiar rule of interpretation that contemporaneous construction receives great weight. This Court

has, from time to time, in construing the Federal Constitution, relied upon and attached much importance to the views of the framers of that instrument and to their exposition of the Constitution in debates and in the Federalist papers.

In *McCullough v. Maryland,* 4 Wheat. 419, Chief Justice Marshall said:

> "The argument which most conclusively demonstrates the error of the construction contended for by the counsel for the State of Maryland, is founded on the intention of the convention as manifested in the whole clause."

And in *Cohens v. Virginia,* 6 Wheat. 418, the Court, in assuming jurisdiction over a decision of the Supreme Court of Virginia, said:

> "Great weight has always been attached, and very rightly attached, to contemporaneous exposition.
>
> "No question, it is believed, has arisen, to which this principle applies more unequivocally than to that now under consideration. The opinion of the Federalist has always been considered as of great authority. It is a complete commentary on our constitution; and is appealed to by all parties, in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank; and the part two of its authors performed in framing the constitution, put it very much in their power to explain the views with which it was framed" (referring, of course, to Hamilton and Madison).

In *Pollock v. Farmers' Loan & Trust Co.,* 158 U. S. 601, Chief Justice Fuller, speaking for the Court on rehearing of the decision in the income tax cases, after

an exhaustive examination of the position taken by the framers of the Constitution on the subject of direct taxation, concluded that portion of his opinion with the statement:

> "In our judgment the construction given to the constitution by the authors of the Federalist * * * should not and can not be disregarded." (p. 627.)

And see:

McPherson v. Blacker, 146 U. S. 1;
Rhode Island v. Mass., 37 U. S. 657.

3.

THE FRAMERS OF THE CONSTITUTION RECOGNIZED THE DISTINCTION BETWEEN THE REPUBLICAN AND DEMOCRATIC FORM OF GOVERNMENT, AND CAREFULLY AVOIDED THE LATTER.

In the Federal Convention of 1787 the distinction between a republican and democratic form of government was constantly in the minds of the framers of the Constitution. Steering between the despised absolutism of a highly centralized government or of a monarchy, on the one hand, and the fantastic government and evils of a pure democracy and the rule of the multitude on the other hand, the founders of our Government planted themselves on the principle of legislation by representatives, elected for that purpose, as the foundation of our institutions.

They were well aware of the dangers of democracy, they abhorred such a form of government. The Federalist papers and the debates of the Federal and State

Conventions at the time abundantly show that above all else the founders of the Government feared the creation of a government of men rather than a government of laws, and that the people of the nation in the first enjoyment of the powers of self-government would drift to that form which would insure license rather than liberty.

In No. 48 of the "*Federalist*" (XII *Hamilton's Works*, p. 28) Madison refers to a democracy

> "where a multitude of people exercise in person the legislative functions, and are continually exposed, by their incapacity for regular, deliberate and concerted measures, to the intrigues of their executive magistrates"; and to a republic "where the executive magistracy is carefully limited both in the extent and in the duration of its power, and where the legislative power is exercised by an assembly * * *".

In the debates in the convention held in New York on the adoption of the Constitution, Hamilton said:

> "It has been observed by an honorable gentleman that a pure democracy, if it were practicable, would be the most perfect government. Experience has proved that no position in politics is more false than this. The ancient democracies in which the people themselves deliberated never possessed one feature of good government. Their very character was tyranny; their figure deformity. When they assembled the field of debate presented an ungovernable mob not only incapable of deliberation, but prepared for every enormity. In these assemblies the enemies of the people brought forward their plans of ambition systematically. They were opposed by the enemies of another party; and it became a matter of contingency whether the people subjected

themselves to be led blindly by one tyrant or by another."

Elliott's Debates, Vol. II, pp. 253-254.

Randolph, in the Federal Convention, observed that

"* * * the general object was to provide a cure for the evils under which the United States labored; that in tracing these evils to their origin, every man had found it in the turbulence and follies of democracy; that some check, therefore, was to be sought for against this tendency of our government, and that a good Senate seemed most likely to answer the purpose".

Ib., Vol. V, p. 138.

"The people immediately," said Sherman, "should have as little to do as may be about the government. They want information and are constantly liable to be misled."

Elliott's Debates, Vol. V, p. 136.

And Gerry said:

"The evils we experience flow from the excess of democracy. The people do not want virtue, but are the dupes of pretended patriots."

Ib., Vol. V, p. 136.

"The history of man clearly shows that it is dangerous to instrust the supreme power in the hands of one man. The same source of knowledge proves that it is not only inconvenient but dangerous to liberty for the people of a large community to attempt to exercise in person the supreme authority. Hence arises the necessity that the people should act by their representatives, but this method so necessary for civil liberty is an improvement of modern times."

Huntingdon—Elliott's Debates, Vol. II, p. 198.

And as Hamilton, in the Federal Convention, truly said, the members of the convention "most tenacious of "republicanism were as loud as any in declaiming "against the vices of democracy".

Ib., Vol. V, p. 202.

In No. 10 of the "*Federalist*" Madison points clearly to the evils and dangers of government directly by the people.

> "The instability, injustice, and confusion introduced into the public councils, have, in truth, been the moral diseases under which popular governments have everywhere perished; as they continue to be the favorite and fruitful topics from which the adversaries to liberty derive their most specious declamation.
>
> "* * * By a faction, I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interest of the community."

He shows that there is grave danger to popular government from the rule of an uncontrollable majority, the members of which are largely swayed by personal interest.

> "When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed. * * *

"From this view of the subject it may be concluded that *a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person,* can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from the form of government itself; and there is nothing to check the inducement to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths. Theoretic politicians, who have patronized this species of government, have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions.

"*A republic, by which I mean a government in which the scheme of representation takes place,* opens a different prospect, and promises the cure for which we are seeking. Let us examine the points in which it varies from pure democracy, and we shall comprehend both the nature of the cure and the efficacy which it must derive from the Union." (Italics ours.)

And see

Elliott's Debates, Vol. V, p. 242.

Wilson, in the Federal Convention, observed that

"Representation is made necessary only because it is impossible for the people to act collectively."

Ib., Vol. V, p. 160.

Ames, in the Massachusetts Convention, said:

"The people must govern by a majority, with whom all power resides. But how is the sense of this majority to be obtained? It has been said that a pure democracy is the best government for a small people who assemble in person. It is of small consequence to discuss it, as it would be inapplicable to the great country we inhabit. It may be of some use in this argument, however, to consider, that it would be very burdensome, subject to faction and violence; decisions would often be made by surprise, in the precipitancy of passion, by men who either understand nothing or care nothing about the subject; or by interested men, or those who vote for their own indemnity. It would be a government not by laws, but by men.

"Such were the paltry democracies of Greece and Asia Minor, so much extolled, and so often proposed as a model for our imitation. I desire to be thankful that our people are not under any temptation to adopt the advice. I think it will not be denied that the people are gainers by the election of representatives. They may destroy, but they cannot exercise, the powers of government in person, but by their servants *they* govern; they do not renounce their power; they do not sacrifice their rights; they become the true sovereigns of the country when they delegate that power, which they cannot use themselves to their trustees."

Elliott's Debates, Vol. II, p. 8.

John Marshall, in the Virginia Convention, said:

"I shall ask the worthy member only, if the people at large, and they alone, ought to make laws and treaties? Has any man this in contemplation? You cannot exercise the powers of government personally yourselves. You must trust to agents. * * *

"Can the whole aggregate community act personally? I apprehend that every gentleman will

see the impossibility of this. Must they, then, not trust them to others? To whom are they to trust them but to their representatives, who are accountable for their conduct?"

Elliott's Debates, Vol. III, pp. 225, 233.

4.

THE EXTENT OF TERRITORY OF THE STATES ALONE SUFFICED, IN THE JUDGMENT OF THE FRAMERS OF THE CONSTITUTION, TO CONDEMN THE ESTABLISHMENT OF A DEMOCRATIC FORM OF GOVERNMENT.

It was constantly being urged upon the framers of the Constitution that the large area of the United States made a republican form of government impracticable; that no large country had ever been ruled successfully by a popular government. The founders of the Constitution conceded the force of the objection as applied to the only popular form of government known to history; but they showed that it was inapplicable to popular government operating under the principle of representation.

Madison said:

"The error which limits republican government to a narrow district has been unfolded and refuted in preceding papers. I remark here only that it seems to owe its rise and prevalence chiefly to the confounding of a republic with a democracy, applying to the former reasonings drawn from the nature of the latter. The true distinction between these forms was also adverted to on a former occasion. It is, that in a democracy, the people meet and exercise the government in person; in a republic, they assemble and administer it by their representatives and agents. A democracy, consequently, will be

confined to a small spot. A republic may be extended over a large region."

"The natural limit of a democracy is that distance from the central point which will just permit the most remote citizens to assemble as often as their public functions demand, and will include no greater number than can join in those functions; so the natural limit of a republic is that distance from the centre which will barely allow the representatives to meet as often as may be necessary for the administration of public affairs."

Federalist, No. XIV, *Hamilton's Works,* Vol. XI, pp. 101, 103.

"The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended.

"The effect of the first difference is, on the one hand, to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose."

Madison in *Federalist,* No. X *Ham. Works,* Vol. XI, p. 75.

And see paragraph IV, sec. 3, *supra,* paragraph IV, sec. 6, *infra.*

5.

THE FORM OF STATE GOVERNMENT PERPETUATED BY THE CONSTITUTION WAS THE REPUBLICAN FORM WITH THE THREE DEPARTMENTS OF GOVERNMENT, IN FORCE IN ALL THE STATES AT THE TIME OF THE ADOPTION OF THE CONSTITUTION.

The form of government provided by the Federal Constitution for the nation, and the perpetuation of which in each of the States underlies the Constitution, was the form of government known and practiced by the people of the Colonies and the States of the Confederation. It was intended that there should be a harmonious similarity between the new National Government and those created in the States. The Constitution guaranteed the continuance of that which was in operation. And, therefore, the guaranty of the Federal Constitution, in Article IV, Section 4, is to be interpreted in the light of the Governments in existence in the State when the Constitution was adopted.

> "Both governments", said Wilson, in the Federal convention, speaking of the national and state governments, "were derived from the people; both meant for the people; both, therefore, ought to be regulated on the same principles."
>
> *Elliott's Debates,* Vol. V, p. 239.

Bowdoin, in discussing the relation of the National to the State Governments, said:

> "Hence it follows that all the governments of the states in the Union ought to be of the same nature: of the republican kind; and that the general government ought to be an assemblage of the spirit and principles of them all. A short comparison pointing out the likeness of the general

to the particular constitutions may sufficiently elucidate the subject.

"All the constitutions of the states consist of three branches, except as to the legislative powers which are chiefly vested in two. The powers of government are separated in all and mutually check each other. These are laid down as fundamental principles in the Federal Constitution. All power is derived, mediately or immediately, from the people in all the constitutions. This is the case with the Federal Constitution. The electors of representatives to the state governments are electors of representatives to the Federal Government" *etc.*

Elliott's Debates, Vol. II, pp. 126-7.

And Madison, in establishing a criterion of a republican form of government, turned to the forms then in existence. He said:

"On comparing the Constitution planned by the Convention with the standard here fixed (*i. e.,* the existing state governments), we perceive at once that it is *in the most rigid sense* conformable to it."

Federalist, No. 39; *Ham. Works,* XI, 310.

How completely the framers of the Federal Constitution were guided by the institutions in existence in the States is pointed out in an article by Alexander Johnston, found in the appendix note to Chap. IV of Vol. I, Ed. 1906, of Bryce's "American Commonwealth".

"Not creative genius", it is there said, "but wise and discreet selection was the proper work of the Convention; and its success was due to the clear perception of the antecedent failures and successes and to the self-restraint of the members. The (presidential) electoral system was almost the

only feature of the Constitution not suggested by State experience" etc., etc.

And the learned author himself, speaking of the Colonies at the time of the adoption of the Constitution, says:

> "All were republicans managing their affairs by elective legislatures, attached to local self government. * * *"
>
> *Bryce, Am. Comm.,* Vol. I, Chap. III of Part I.

Tiedeman, at page 24 of his monograph on the "Unwritten Constitution of the United States", says:

> "The fundamental division of governmental powers into executive, legislative, and judicial, and their exercise by separate and independent departments of the government, form a striking characteristic of both the English and American constitutions. *Even before they had emerged from the colonial state, the Americans had adopted this doctrine,* and divided their local governments into executive, legislative, and judicial departments, conceding to each department the powers exercised by the corresponding department of the English government." (Italics ours.)

In all of the States the principle of representation lay at the foundation of the Government. Pendleton in the Virginia convention said:

> "When the bands of our former society were dissolved, and we were under the necessity of forming a new government, we established a constitution *founded on the principle of representation,* preserving therein frequency of elections and guarding against inequality of suffrage. I am one of those who are pleased with that Constitution, because it is built on that foundation."
>
> *Elliott's Debates,* Vol. III, p. 298.

It was, therefore, not a new idea that was being introduced to the American people. The Federal Constitution but continued the existing forms of government and was itself closely akin to them.

In *People v. Draper*, 15 N. Y. at p. 537, the Court said:

> "We must keep in mind that the constitution was not framed for a people entering into a political society for the first time, but for a community already organized, and furnished with legal and political institutions, adapted to all, or nearly all, the purposes of civil government; and that it was not intended to abolish these institutions, except so far as they were repugnant to the constitution then framed." Gray, J.

In *Ex parte Anderson*, 134 Cal. 74, Justice Van Dyke said:

> "The terms employed in framing a Constitution or in the enactment of laws by the legislature are to be construed *as they were generally understood at the time.* Our system of government is not that of a pure democracy, but it is a representative republic. This holds throughout, from the smallest subdivision, such as cities and towns, up through counties and states, to the federated or national government. The people, in their individual capacity, do not make or enforce laws to govern them, but they delegate the power to their agents to make laws, and also to construe and enforce them." (Italics ours.)
>
> "Every government", said Reverdy Johnson, "is republican in point of form which corresponds with the governments in existence when the constitution was adopted." See note in
>
> *II Story on the Constitution*, p. 592.

Calhoun said:

> "The forms of the governments of the several States composing the Union, as they stood at the time of their admission, are the proper standard by which to determine whether any afterchange in any of them makes its form of government other than republican." 6 Works, 219.

In a recent case the Supreme Court of Iowa expressed itself as follows:

> "The purpose of the federal Constitution was to provide a form of government, republican in character, for the states as a united whole. This is manifest from the history of the times, the contemporaneous writings and public addresses, the constitutional debates and the provisions of the instrument itself as adopted. And whatever may be the form of words employed by the lexicographers —and they are more or less varied—to define what is meant by the expression 'a republican form of government', it is clear that it was understood by the fathers to mean a government by the people, through representatives appointed by them to the various departments—executive, legislative, and judicial, as provided—either by direct vote or through some intervening officer or body by them selected and appointed by direct vote for the purpose. Now, at the time the constitution was adopted, as it is well known, there were in existence 13 states, each thereof supreme as related to its own domestic affairs, and in each of which the government was divided into three departments—executive, legislative, and judicial—and carried on through representatives selected from time to time by vote of the people."

Eckerson v. City of Des Moines, 115 Northwestern 177-*181*; 137 Ia. 452.

In *Minor v. Happersett*, 21 Wall. 162, the meaning of the federal guaranty of a republican form of government was explained as follows:

> "The guaranty is of a republican form of government. * * * All the states had governments when the Constitution was adopted. In all the people participated to some extent, through their representatives elected in the manner specially provided. These governments the Constitution did not change. They were accepted precisely as they were, and it is, therefore, to be presumed that they were such as it was the duty of the States to provide. *Thus we have unmistakable evidence of what was republican in form, within the meaning of that term as employed in the Constitution.*" (Italics ours.)

6.

THE HISTORY OF OTHER NATIONS DOES NOT FURNISH THE DEFINITION OF THE PHRASE "REPUBLICAN FORM OF GOVERNMENT" AS THOSE WORDS WERE USED BY THE FRAMERS OF THE CONSTITUTION. THEY DISTINGUISHED THE AMERICAN FROM ALL OTHER REPUBLICS BY THE INTRODUCTION OF THE PRINCIPLE OF REPRESENTATION.

Speaking of the difference between the government of the ancient republics and that proposed in the Constitution, the author of Federalist paper No. 63 said:

> "The true distinction between these and the American government lies in the total exclusion of the people in their collective capacity from any share in the latter."
>
> *XII Hamilton's Works*, p. 141.

In No. 39 of the *Federalist*, Madison said, after referring to various nations whose governments had been denominated republics:

"These examples, which are nearly as dissimilar to each other as to a genuine republic, show the extreme inaccuracy with which the term has been used in political disquisitions."

And he says:

"We may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior."

Federalist, No. 39, XI *Hamilton's Works,* p. 309.

As Sir Henry Maine points out, there was but little comfort for the founders of our Government in the history of republics. The authors of the "Federalist" were, as he says,

"deeply troubled by the ill success and ill repute of the only form of government which was possible for them. The very establishment of their independence had left them a cluster of republics in the old sense of the word, and, as hereditary kingship was out of the question, their federal constitution was necessarily republican. They tried to take their own republic out of the class as commonly understood. What they chiefly dreaded was disorder, and they were much impressed by the turbulence, the 'fugitive and turbulent existence' of the ancient republics. But these, they said, were not republics in the true sense of the name. They were 'democracies', commonwealths of the primitive type, governed by the vote of the popular assembly, which consisted of the whole mass of male citizens met together in one place. *The true republic must always be understood as a commonwealth*

saved from disorder by representative institutions." (Italics ours.)

Maine's Popular Government, Essay IV, Const. U. S., pp. 198-199.

By introducing the principle of representation into the form of democracy they adopted a type of government new to history which they called "republican", and which, as has been shown, was in use in all of the States at the time the Constitution was written.

> "It was a long and varied experience in *representative forms* which laid the foundation of the theory of government adopted by the framers of the Constitution. Unappalled by the scepticism of European kings they proceeded to extend their self-government over regions which in all previous ages had been esteemed too vast for republican rule." (Italics ours.)
>
> *Bancroft Hist. of U. S.,* Vol. IX, p. 259.

Hamilton, in No. 9 of the *Federalist,* conceded that the petty republics of Greece and Italy had been utter and complete failures.

> "If," he said, "it had been found impracticable to have devised a more perfect structure, the enlightened friends to liberty would have been obliged to have abandoned the cause of that species of government as indefensible. The science of politics, however, like most other sciences, has received great improvement. The efficacy of various principles is now well understood which were either not known at all or imperfectly known to the ancients. The regular distribution of power in the distinct departments; the introduction of legislative balances and checks; the institution of courts composed of judges holding their offices during good behavior; the representation of the people in the legislature

by deputies of their own election, these are wholly new discoveries, or have made their principal progress towards perfection in modern times."

XI Hamilton's Works, p. 61.

The debates respecting the adoption of the Constitution show that much of the hostility to the proposed government was based on the experience of those nations which had without success attempted a popular form of government.

Mason, whose opposition to the Constitution was consistent, urged that a republic was impossible in this country. He said:

"It is ascertained, by history, that there never was a government over a very extensive country without destroying the liberties of the people. History also, supported by the opinions of the best writers, shows us that monarchy may suit a large territory, and despotic governments ever so extensive a country, but that popular governments can only exist in small territories. Is there a single example, on the face of the earth, to support a contrary opinion? Where is there one exception to this general rule? Was there ever an instance of a general national government extending over so extensive a country, abounding in such a variety of climates, &c., where the people retained their liberty."

Elliott's Debates, Vol. III, p. 30.

But a few references to the debates of the Federal and State conventions of 1787-8 will clearly show that the founders of our Government relied on representation in government to save this republic from the fate of previous republics; more than any other feature in

the proposed plan, the principle of representation led to its adoption.

Wilson, a member of the Federal Convention, and who with great success explained the Federal Constitution to the Pennsylvania Convention, pointed out that the ancient republics were not the model for the government which the people were forming. He said:

> "One thing is very certain—that *the doctrine of representation in government was altogether unknown to the ancients.* Now, the knowledge and practice of this doctrine is, in my opinion, essential to every system that can possess the qualities of freedom, wisdom and energy." (Italics ours.)
>
> • • •
>
> "For the American states were reserved the glory and the happiness of diffusing this vital principle throughout the constituent parts of government. Representation is the chain of communication between the people and those to whom they have committed the exercise of the powers of government."
>
> *Elliott's Debates,* Vol. II, pp. 423, 424.

John Marshall, in the Virginia Convention, said:

> "The extent of the country is urged as another objection, as being too great for a republican government. This objection has been handed from author to author, and has been certainly misunderstood and misapplied. To what does it owe its source? *To observations and criticisms on governments, where representation did not exist.*" (Italics ours.)
>
> *Elliott's Debates,* Vol. III, p. 232.

> "Animadverting on Mr. Henry's observations, that the French had been the instruments of their own slavery, that the Germans had enslaved the

Germans, and the Spaniards the Spaniards, &c., he asked if those nations knew anything of representation. The want of this knowledge was the principal cause of their bondage."

Corbin, Virginia Convention. *Elliott's Debates,* Vol. III, p. 417.

Hamilton, in the New York Convention, said:

"Mr. Chairman, it has been advanced as a principle, that no government but a despotism can exist in a very extensive country. This is a melancholy consideration indeed. If it were founded on truth, we ought to dismiss the idea of a republican government, even for the state of New York. This idea has been taken from a celebrated writer, who by being misunderstood, has been the occasion of frequent fallacies in our reasoning on political subjects. But the position has been misapprehended; and its application is entirely false and unwarrantable; it relates only to democracies, where the whole body of the people meet to transact business, and where representation is unknown. Such were a number of ancient and some modern independent cities. Men who read without attention have taken these maxims respecting the extent of country, and, contrary to their meaning, have applied them to republics in general."

Elliott's Debates, Vol. II, p. 352.

At another time, Hamilton concisely and clearly explained each of the so-called republican confederacies, to wit: the Amphictyonic, the Dutch, the Germanic, the Lycian and Achaean, and said:

"No inference can be drawn from these examples, that republics cannot exist; we only contend that they have hitherto been founded on false principles."

Elliott's Debates, Vol. II, p. 235.

In the Massachusetts Convention, one of the delegates illustrated by reference to the history of Sparta, Athens and Rome, that republics soon degenerated into aristocracies. The fall of the Amphictyonic League was referred to. Gorham replied "that hypotheses could " not be drawn from the ancient Governments", *"for " those Governments had no idea of representations as " we have."* (Italics ours.)

Elliott's Debates, Vol. II, p. 69.

Monroe, answering criticisms based on references to history, said:

> "Let us see how far these positions are supported by the history of these leagues, and how far they apply to us. The Amphictyonic council consisted of three members,—Sparta, Thebes and Athens. What was the construction of these states? Sparta was a monarchy more analogous to the Constitution of England than any I have heard of in modern times. Thebes was a democracy, but on different principles from modern democracies. *Representation was not known then. This is the acquirement of modern times."* (Italics ours.)
>
> Virginia Convention. *Elliott's Debates,* Vol. III, p. 209.

Zachariah Johnson, in the same convention, said:

> "As to the principle of representation, I find it attended to in this government in the fullest manner. It is founded on absolute equality."

Pointing out how the principle appears in the proposed Constitution, he continued:

> "• • • when I review all these things • • • I plainly see a security of the liberties of this country, to which we may safely trust. *Were this*

> *government defective in this fundamental principle of representation, it would be so radical that it would admit of no remedy.''* (Italics ours.)
>
> *Elliott's Debates,* Vol. III, pp. 644, 645.

Pinckney, one of the ablest delegates in the Federal Convention, showed that the Governments in the States of the Confederation, and not historical precedents, furnished the type of republic perpetuated by the Constitution.

> "All the States", he said, "had adhered in their forms to the republican principle, though they have differed widely in their opinions of the mode best calculated to preserve it."

He reviewed the Government of each of the States, and said:

> "All the republics we read of, either in the ancient or modern world, have been extremely limited in territory. We know of none a tenth part so large as the United States; indeed, we are hardly able to determine from the lights we are furnished with, whether the governments we have heard of under the names of republics really deserved them, or whether the ancients ever had any just or proper ideas upon the subject. *Of the doctrine of representation, the fundamental of a republic, they certainly were ignorant.* If they were in possession of any other safe or practicable principles, they have long since been lost and forgotten to the world." (Italics ours.)
>
> *Elliott's Debates,* Vol. IV, pp. 325-6.

As has been well said by Francis Lieber, the framers of our Constitution established a

> "representative national government"; "the highest national polity yet developed", * * * "equally distant from the market place republic of old and

the despotism of Asia or Europe, from absorbing centralism and dissolving communism", &c.

Miscellaneous Works, Ed. 1881, Vol. II, p. 225.

It is not to be disputed that the term "republic" has been used with widely varying meanings. Two propositions, however, are clear: 1. That by a republican form of government the founders of our country meant a popular or democratic form operating under the principle of representation, this being the cardinal republican feature. 2. That the word "republican" in the Constitution must be given the meaning which the framers of the Constitution understood it to have.

At the same time the weakness of representative government was thoroughly appreciated in the Federal Convention and it was well understood that corruption is inseparable from a republican form of government.

Hamilton *"Federalist"*, No. 62; *Ham. Works,* XII, p. 128.

"In Massachusetts", said Gerry, "the worst men get into the legislature."

Elliott's Debates, Vol. V, p. 160.

Mason said:

"It was to be considered that no government was free from imperfections and evils; and that improper elections in many instances were inseparable from republican governments. But compare these with the advantages of this form in favor of the rights of the people—in favor of human nature."

Ib., p. 161.

Mercer called attention to the fact that:

> "The corruption and unstability of the legislative councils of the States had led to the appointment of the Convention."
>
> *Ib.*, p. 424.

Manifestly the makers of the Constitution considered the dangerous abuses of government directly by the people worse than the evils of misrepresentation which it is claimed can be overcome by direct legislation.

It is further to be observed that direct legislation was not unknown to the framers of the Constitution.

It had been practiced consistently in the town meetings of the municipalities of Massachusetts and of other States. Nothing was better known to the founders of our Government.

See:

Ex parte Pfahler, 150 Cal. 71; 88 Pac. 273;
In re Municipal Suffrage to Women, 160 Mass. 586; 36 N. E. 488.

See, also, Daniel Webster's argument in *Luther v. Borden,* 7 How. 1.

But the Federal Constitution recognizes only one method of exercising the state legislative powers, *i. e.,* by State Legislatures. The views of the members of the Federal Convention on the evils of democracy, demonstrate that they condemned legislation by the people with singular unanimity. And the existence of direct legislation in municipal affairs lends significance to its studied elimination from the Governments devised for the States and the Nation.

7.

INITIATIVE LEGISLATION IS INVALID BECAUSE GOVERNMENT BY THE PEOPLE DIRECTLY IS INCONSISTENT WITH OUR FORM OF GOVERNMENT.

It has been shown that the vital element in a republican form of government, as that phrase is used in American political science, is *representation.* Legislation by the people directly is the very opposite, the negative of this principle. It can, therefore, have no place in our form of government. Indeed, it has been repeatedly said to be contrary to and subversive of the structure of our republic.

See the language of the Court in *In re Duncan, supra,* quoted herein at page 25.

In *State v. Swisher,* 17 Tex. 448, 449, it was said:

> "But, besides the fact that the Constitution does not provide for such reference to the voters to give validity to the acts of the legislature, we regard it as repugnant to the principles of the *representative government* formed by our Constitution. Under our Constitution, the principle of lawmaking is that laws are made by the people, not directly, but by and through their chosen representatives. By the act under consideration, this principle is subverted, and the law is proposed to be made at last by the popular vote of the people, leading inevitably to what was intended to be avoided, confusion and great popular excitement in the enactment of laws." (Italics ours.)

There is no finer exposition of the repugnancy of direct legislation by the people to our form of govern-

ment than that contained in the opinion of Justice Booth, in the case of

Rice v. Foster, 4 Harr. (Del.) 479.

The following is from the language of that case:

"The proposition that an act of the legislature is not unconstitutional, unless it contravenes some express provision of the constitution, is, in the opinion of this court, untenable. * * * So also an act is void, if it palpably violates the principles and spirit of the constitution, or tends to subvert our republican form of government. Of this character, it is contended, is the act of the legislature of the nineteenth of February, 1847.

"The powers of government in the United States are derived from the people, who are the origin and source of sovereign authority. The framers of the Constitution of the United States, and of the first constitution of this State, were men of wisdom, experience, disinterested patriotism, and versed in the science of government. They had been taught by the lessons of history, that equal and indeed greater dangers resulted from a pure democracy, than from an absolute monarchy. Each leads to despotism. *Wherever the power of making laws, which is the supreme power in a State, has been exercised directly by the people under any system of polity, and not by representation, civil liberty has been overthrown.* Popular rights and universal suffrage, the favorite theme of every demagogue, afford, without constitutional control or a restraining power, no security to the rights of individuals, or to the permanent peace and safety of society. In every government founded on popular will, the people, although intending to do right, are the subject of impulse and passion; and have been betrayed into acts of folly, rashness and enormity, by the flattery, deception, and influence of demagogues. A triumphant majority oppresses the mi-

nority; each contending faction, when it obtains the supremacy, tramples on the rights of the weaker; the great aim and objects of civil government are prostrated amidst tumult, violence and anarchy; and those pretended patriots, abounding in all ages, who commence their political career as the disinterested friends of the people, terminate by becoming their tyrants and oppressors. History attests the fact, that excesses of deeper atrocity have been committed by a vindictive dominant party, acting in the name of the people, than by any single despot. In modern times, the scenes of bloodshed and horror enacted by the democracy of revolutionary France, in the days of her short-lived misnamed republic, shocked the friends of rational liberty throughout the civilized world. There, in the midst of the most refined and polished nation of Europe, the guillotine dispensed with the forms of law as unmeaning pageants; and, under the capricious mandates of popular frenzy, running wild in pursuit of the phantom of a false licentious liberty, 'suspicion filled their prisons and massacre was their gaol delivery'.

"In the convention of 1787, which formed the Constitution of the United States, the spirit of insubordination, and the tendency to a democracy in many parts of our country, were viewed as unfavorable auguries in regard both to the adoption of the Constitution, and its perpetuity. The members most tenacious of republicanism, were as loud as any in declaiming against the vices of democracy. Mr. Gerry, of Massachusetts, the friend and associate of Mr. Jefferson, thought it 'the worst of all political evils'. The necessity of guarding against its tendencies, in order to attain stability and permanency in our government, was acknowledged by all. Even the propriety of electing by an immediate vote of the people, the first branch of the national legislature was seriously questioned by some of the ablest members and warmest advocates of a repub-

lican form of government. * * * In the debates on the Federal Constitution in the Virginia convention, Mr. Madison, always the advocate of popular rights, subject to the wholesome restraints of law, remarked, 'that turbulence, violence and abuse of power by the majority trampling on the rights of the minority, have produced factions and commotions; and that these in republics, more frequently than any other cause, have produced despotism'. 'If', he observes, 'we go over the whole history of ancient and modern republics, we shall find their destruction to have generally resulted from those causes. If we consider the peculiar situation of the United States, and go to the sources of that diversity of sentiment which pervades its inhabitants, we shall find great danger to fear that the same causes may terminate here, in the same fatal effects which they produced in those republics.' *To guard against these dangers and the evil tendencies of a democracy, our republican government was instituted by the consent of the people.* The characteristic which distinguishes it from the miscalled republics of ancient and modern times, is, that none of the powers of sovereignty are exercised by the people; but all of them by separate, co-ordinate branches of government in whom those powers are vested by the Constitution. These co-ordinate branches are intended to operate as balances, checks and restraints, not only upon each other, but upon the people themselves; to guard them against their own rashness, precipitancy and misguided zeal; and to protect the minority against the injustice of the majority." (Italics ours.)

In discussing the legality of the referendum, the Supreme Court of Michigan, in forcible language, demonstrated the inconsistency of direct intervention by the people, with our form of government:

"The power of enacting general laws cannot be delegated—not even to the people. There is nothing in the Constitution which authorizes or contemplates it; nothing in the nature of the power which requires it; nothing in the usages of our American government which sanctions it; no single adjudication of a court of last resort, in any State, which affirms it; and such delegation would be contrary to the intent manifested by the very structure of the legislative department of the Government.

"While the power and the responsibility of legislation remain where the Constitution has placed them, before any proposed measure can become a law it must first struggle for ascendency at the ballot box, amid the numerous issues involved in all political contests. *It must pass through the ordeal of public and deliberate discussion in the legislature.* It must receive the sanction of the concurrent vote of a majority, or, having been returned with the governor's veto, of two-thirds of the members of the two houses of which the legislature is composed—votes cast by men who are not the mere deputies of their immediate constituents, but the representatives of the whole people, and bound to act for the general good; who are responsible to the people for their action, and may be held to that responsibility. Public opinion will prevail, and pass into public law; but it will be enlightened, deliberate, permanent and organically expressed public opinion. It is this opinion alone which the constitution designed should govern. *Such a government secures deliberation and responsibility in legislation, and affords protection against the despotism of official rulers on the one hand, and of irresponsible, numerical majorities on the other.* It has been appropriately termed 'the flower of modern civilization'.

"But if the legislature may transfer this power and this responsibility to the people, where are the checks which the constitution intended to provide

against hasty and inconsiderate legislation? Where are the securities against arbitrary and irresponsible power? We may be subjected to the dominion of the popular majority of the hour—*a majority whose opinion must be formed without legislative discussion or deliberation*—a majority responsible to no one, because it has no superior—impatient of restraint, because conscious of its strength, and apt to think itself infallible, and against whose resistless will, thus exercised directly on matters of legislation, with an elective judiciary, all the restraints which the constitution has imposed upon legislative power will, in the end, prove utterly unavailing. In short, if this power may be delegated to the people, then, by the action of one of its departments, this *representative* government may be transformed into a collective democracy, the only such democracy practicable where the people are too numerous to assemble *en masse,* namely, a democracy in which a select body propose the laws, and the people adopt or reject them."

The People v. Collins, 3 Mich. Rep. 416, 417.

And in the same case the Court asked:

"Can it be possible that any man of mature years believes that, under our representative system of government, statute laws can be constitutionally enacted in this way? And can it be possible that any American citizen, out of a mad house, is desirous, even in a legal manner, of establishing in this country such a system of government?" (p. 368.)

* * * * * * *

Again:

"And before closing, I feel it my duty to say, that I deeply regret the evils sought to be removed by the act before us; but, great as these evils are, and as much to be deplored and deprecated as they may be, I had much rather be compelled to

witness their continuance in the land for years yet to come, than to see our constituted system of representative government perverted, and a collective democracy established, by an assumption of arbitrary, unconstitutional power, on the part of the legislature, and a ratification of such assumption by the people."

The People v. Collins, 3 Mich. 399.

In *Thorne v. Cramer,* 15 Barb. 112, the Court, holding that the Legislature could not delegate its powers of legislation and submit to the voters of the State the question whether an act to establish free schools should become a law, said:

> The doctrine that no harm can result from allowing the people to exercise, directly, the law-making power, is more plausible than sound. If it were a legitimate subject for investigation at this time, we think it might be easily shown, that some of the very worst evils must necessarily flow from such a violation of the fundamental law. The constitution has wisely deposited the legislative power in the hands of a limited number of chosen men. This is done, partly, because of the impracticability of having laws passed in a mass assemblage of the people; and, partly, because it is supposed that the chosen representatives will be better qualified for the duty than a considerable portion of the electors. It is hardly necessary to say, that many voters are not in all respects qualified to become governors or legislators. They may have discretion enough to select suitable men for those offices; but if they were put directly to the business of framing laws themselves, they would be quite out of their element. Can we not then foresee dangers to arise from a delegation of the legislative franchise, even to the people themselves?" (p. 117.)

On page 118 the Court said:

> "According to the theory of constitutional governments all power is inherent in the people. They are the original sovereigns. Before the establishment of a regular government they exercise the power in their native capacities. They themselves not only make, but administer the laws. They enact; they adjudge; they execute. For, in that state of nature, *might* makes *right; and majorities are, of course, omnipotent and despotic.* But when the people frame a constitution to live under, they yield up certain natural, personal rights, and consent that those yielded rights shall, thenceforth, be exercised only by certain selected persons, in a prescribed manner."

The subject was exhaustively examined in *People v. Parker,* 6 Barr. 507. The Court said at page 512:

> "But though it was thus proclaimed, that the sovereign power resided in the body of the people, and that the only legitimate end of government is the promotion of their welfare, *the utter impracticability of a personal and immediate exercise of this power by them,* in the administration of the affairs of government, *forbade the idea of a pure democracy.* * * * But had these reasons been wanting, other important objections would have interposed to prohibit the immediate exercise of administrative authority by the mass of the community acting directly on the subject. Among these may be mentioned the necessarily uncertain and fluctuating character of popular decisions, induced by the excitement of collision, and often by unreasoning passion and prejudice; the violent commotions to which popular assemblies are constantly exposed, especially when acting under the influence of party zeal, inflamed by the seductions of factious eloquence and artful sophistry; the difficulty, if not impossibility, of deliberation and consultation, and

above all, the imminent danger that, in the absence of a sense of responsibility, the surest guaranty of social justice, the rights of the minority would be disregarded by a majority seeking only the gratification of its own desires, or the advancement of its peculiar opinions. In discussing proposed schemes of government, these objections had not escaped the public attention, of which the public debates of that day give ample evidence."

Referring to Madison's fear of the abuse of power by the majority, the Court added:

"This was but an expression of the prevailing sentiment. In accordance with it, though all the written constitutions framed by the several states of the confederacy acknowledged the sovereignty to reside in the mass of the people, its exercise by them was, either expressly or by necessary implication, confined to the establishment of the Constitution, the amendment of its defects, the correction of the abuses of government, and the choice of public servants."

Commenting upon the amended Constitution of 1835, which re-established the General Assembly, consisting of a Senate and House of Representatives, the Court said that the vote of the people conclusively showed

"that the experience of nearly half a century had worked no change in the sentiment which lodged the legislative authority of the commonwealth in selected and responsible bodies of men, liable to the animadversion of their constituents, as the only safe depository of this portion of the sovereign power."

Again, on page 516:

"*An attempt to do so (i. e., lodge legislative power directly with the people) would be not only*

to disregard the constitutional inhibition, but tend directly to impress upon the body of the state those social diseases that have always resulted in the death of republics, and to avoid which the scheme of a representative democracy was devised and is to be fostered. Athens once possessed a government in a measure representative; but the decrees of its senate were subject to the supervision of the popular assemblies of the citizens, who, by progressive innovations, entirely changed the nature of the constitution, and introduced corruption, anarchy, and final destruction." (Italics ours.)

The referendum was thus criticized by the Court, in speaking of the executive and legislative departments:

"Nor can they call to their aid the mass of the community, except in the modes prescribed by the fundamental law. To permit either of these courses, would be to loosen the hold of society from its greatest safety, by removing all accountability, and *thus subjecting the minority to the unrestrained decisions of irresponsible and fluctuating majorities.* In the present instance, the good proposed by the act of Assembly may blind the unreflecting to the ultimate consequences of the false principle upon which it proceeds; but the most indifferent and unobservant cannot but be startled by the reflection, that it is a principle capable of universal operation in the business of legislation, and may be in the end employed to procure the establishment of laws which a responsible legislature would not dare to enact. * * * (p. 519.)

" * * * If the two houses can divest themselves of their office of law-makers, and devolve it upon the body of the people, what security have we against the passage of laws, perhaps well meant, but liable to be glaringly wrong, because inconsiderately adopted? And what check is left us upon hasty and ill-advised zeal, open to be influenced

> and misguided by interested, cunning, or blind fanaticism? If the practice be sanctioned, there may follow a train of experiments which, unarrested at some point of their progress, must end in the final overthrow of the constitution. Every case of doubtful propriety will be referred to the result of a ballot; and acts of Assembly, subject to the popular vote, will be yielded to unthinking clamor or partisan importunity, by faithless legislators anxious to escape the responsibility of their position."

It was urged that there was some precedent which had legitimized the submission of legislative questions to the popular vote. Of this reasoning the Court said:

> "In questions of mere property, an inveterate error, which, by repetition, has attained to the dignity of a rule, may be tolerated: because an attempt to correct it would generally be productive of more mischief than will be worked by its continuance. But such an argument can have no place where the error committed touches, with the finger of corroding wrong, the political organization of a state and threatens its existence. In such a case, the duty of preserving the constitution intact is paramount to every other, and, irrespective of veteran abuses, so imperatively calls for the eradication of the canker, that the judiciary, which should shrink from applying the appropriate corrective, would be justly chargeable with a gross dereliction of duty."

Chief Justice Gibson, in the case of the *Borough of West Philadelphia,* 5 Watts & Serg. Rep., 283, said:

> "Under a well-balanced constitution, the legislature can no more delegate its proper function than can the judiciary. It is on the preservation of the lines which separate the cardinal branches of the government, that the liberties of the citi-

> zen depend; for a consolidated sovereignty, in whatever form, is a despotism in so far as it subjects the governed, not to prescribed rules of action, to which he may safely square his conduct beforehand, but to the unsettled will of the ruling power, which cannot be foreseen; and a government becomes consolidated in proportion as its legislative branch abandons its own functions, or usurps those which have been vested elsewhere. *In the very constitution of things, the whole people of a State cannot assemble together to exercise their sovereign power in person;* and it is not to be regretted that they cannot, for their rule being untrammeled by anything but their own will, would be as arbitrary and fitful in its exercise as any other uncontrolled domination." (Italics ours.)

Chief Justice Denio, in *Clarke v. City of Rochester,* 28 N. Y. 606, 633, said:

> "The government organized by the Constitution was considered to be, as it undoubtedly is, that of a *representative republic,* and no power existed in the Legislature to convert it on any occasion, or for any purpose, into a *pure democracy.* The organization of the law-making power is one of the principal purposes of a constitutional charter of government, and in all communities of considerable extent, this must be effected by means of a system of representation, by which the people at stated periods delegate to citizens chosen by them the power of enacting general laws, by which all the members of the State are to be governed."

We leave this branch of the discussion with an extract from the concurring opinion of Justice Harrington in *Rice v. Foster (supra):*

> "Gloomy indeed would be the prospect for this or any other representative republic, if the people

themselves should ever withdraw this power from their representatives, to exercise it through the medium of legislative ballot-boxes. All history teaches, not only that this would lead to anarchy and despotism; but that it is itself a state of anarchy. Fortunate it is for us, that our wise and patriotic ancestors, have interposed between us and such a state, the restraints of the constitution; which neither the judiciary, nor the legislature, nor the people themselves, will ever disregard, when the true principles of the constitution come to be considered, and fully understood."

8.

THE WELL-KNOWN PRACTICES OF (a) ADOPTING STATE CONSTITUTIONS BY POPULAR VOTE, AND OF (b) LOCAL LEGISLATION IN "TOWN MEETINGS" FURNISH NO PRECEDENT FOR THE LODGMENT OF LEGISLATIVE POWER IN THE BALLOT-BOX.

(a) Subject to the Federal Constitution, the people of the several States may make their own constituent laws, and the amendment of State Constitutions is properly the subject of popular vote. But constitutional amendments are alterations of the social compact pursuant to which government is conducted and legislation is enacted. Framing the constituent law is not legislation.

Dicey, Law of the Constitution, (Chap. 2, Part I.)

The adoption of the Federal Constitution was not legislation; neither is the adoption by the people of the States of their organic law. The people of this country define by constitutional provisions the limits within which, and the subjects over which, the legislative power

may extend. It is proper that they should do so by popular vote. It is a part of the compact which, backed by the force of the majority, lies at the root of all free government. That compact is the protection of the minority.

See

Thorne v. Cramer, supra;

People v. Parker, supra;

Daniel Webster's argument in Luther v. Borden, supra.

(b) Nor does the practice of legislating directly in municipal affairs furnish a precedent. It has been pointed out that nothing is more firmly engrafted on the institutions of this country than the practice of conducting the business of municipalities by assemblies of the voters.

Speaking of the State Constitutions, the Supreme Court of Massachusetts said:

> "The characteristic feature of all these Constitutions is that they establish a government by representatives of the people, and not a government directly by the people. This was the kind of government to which the people were accustomed. • • • While a purely democratic form of government existed in the towns of New England, few, if any, persons seem to have been in favor of such a form of government for the State."

In re Municipal Suffrage to Women, 160 Mass. 586; 36 N. E. 488.

In *Ex parte Pfahler*, 150 Cal. 71; 88 Pac. 273, the Court said:

> "It is clear that the direct participation of the electors of subdivisions of a state in legislation as to local affairs was never intended to be prohibited by the framers of the Federal Constitution, or the states adopting the same, and that such power has been exercised by them, where not inconsistent with provisions of their state constitution, in innumerable instances, from the institution of our government to the present day, without interference of any kind on the part of the federal government.
>
> "As is universally recognized by courts and writers on constitutional law, it must be assumed that there was nothing in any of the forms of government prevailing in the various states at the time of the adoption of the Constitution that was violative of the provisions under discussion. * * * *The constitutional provision was framed and adopted with full knowledge of this system of local government that then obtained in four of the states, and that system was continued under the Constitution, without any question as to its validity.*" (Italics ours.)

A purely democratic form of town government has never been considered inconsistent with a republican form for the central government of the States. As explained by Madison, the divergence in area would alone suffice for the difference between the success of the first and the failure of the latter.

It was often said that the greater a mass of voters, the more unruly and the more easily influenced by passion and prejudice, by demagogism, by factional hatred and ill-will, by the evils that characterize pure democracy. That these forces should find greater room for play in a

plebiscite by the voters of a State than in a meeting of townspeople is evident. For these reasons, we find the forms of pure democracy in town governments well established in our polity at once with the forms of republicanism in the States and in the government of the United States.

Finally, there is little similarity between the town governments of New England and government by the ballot. The New England town governments were based on the direct participation of citizens in the deliberations over the proposal and enactment of laws.

As is pointed out by Justice McKinstry, in *Ex parte Wall,* 48 Cal. 279, at p. 322, in speaking of a statute providing for the enactment of laws by popular vote:

> "There is no provision for an assemblage of the people of the town for deliberation; the vote to be taken can in no way be said to express the result of such deliberation. The Constitution intended that the opinion of a majority should govern as to town matters, but that it should be an 'organically expressed' opinion. * * * The statute under consideration simply permits a species of plebiscitum with reference to a particular subject in which the only option of the people of a township is to say 'yes' or 'no' to a complicated project. * * * This statute furnishes neither a system nor a government. * * * *That cannot be called a system of town government in which no deliberative assemblage is provided for,* and in which a local law is adopted by the ballots of perhaps a bare majority who vote secretly and without consultation with the rest of the voters; who are actuated by motives which need not be publicly avowed or controlled by reasons the weakness of which would be exposed by a public discussion." (Italics ours.)

V.

THE FEDERAL CONSTITUTION PRESUPPOSES IN EACH STATE THE MAINTENANCE OF A REPUBLICAN FORM OF GOVERNMENT AND THE EXISTENCE OF STATE LEGISLATURES, TO WIT: REPRESENTATIVE ASSEMBLIES HAVING THE POWER TO MAKE THE LAWS; AND THAT IN EACH STATE THE POWERS OF GOVERNMENT WILL BE DIVIDED INTO THREE DEPARTMENTS: A LEGISLATURE, AN EXECUTIVE AND A JUDICIARY. ONE OF THESE, THE LEGISLATURE, IS DESTROYED BY THE INITIATIVE.

1.

STATE LEGISLATURES ARE A VITAL FEATURE OF OUR GOVERNMENT; THE FEDERAL CONSTITUTION PRESUPPOSES THEIR EXISTENCE AND IMPOSES ON EACH STATE THE OBLIGATION TO MAINTAIN THEM.

It was a natural result of the views taken by the framers of the Constitution that the Federal Government should have been founded on the existence in each of the States of a form of government embodying the principles of a true republic. This involved the maintenance of representative legislative assemblies.

The history of the clause of the Constitution providing for the election of senators affords ample evidence that the framers of the Constitution designedly provided for the perpetuation of the State Legislatures. It was only after much debate that it was finally resolved to have the senators chosen by the Legislatures.

During the discussion of the method of electing the members of the House of Representatives Pinckney moved that the "members of the first branch be appointed in such manner as the several State Legisla-

" tures shall direct". Madison and others opposed the motion and Hamilton said:

> "It is essential to the democratic rights of the community that this branch be directly elected by the people. Let us look forward to probable events. *There may be a time when state legislatures may cease; and such an event ought not to embarrass the national government.*"
>
> *Elliott's Debates,* Vol. I, p. 433.

Pinckney's motion was lost. A few days later when the debate was on Randolph's fourth resolution providing for the election of United States senators by the Legislatures of the States, Wilson and others maintained that this arrangement again would make the general Government absolutely dependent upon the continuance of the State Governments.

Elliott's Debates, Vol. I, p. 446.

Elsworth, *contra,* argued:

> "The state legislatures are more competent to make a judicious choice than the people at large. Instability pervades their choice. In the second branch of the general government, we want wisdom and firmness."
>
> *Elliott's Debates,* Vol. I, p. 446.

The resolution passed in the affirmative on the same day.

Elliott's Debates, Vol. I, p. 447.

The effect of this and other provisions as was pointed out during the numerous debates on the adoption of the Constitution was that the Legislatures of the States became vital parts of our scheme of government.

Davie, one of the delegates to the Federal Convention observed:

> "Every part of this federal government is dependent on the constitution of the state legislatures for its existence." • • •
>
> "The Federal Convention were as well convinced as the members of this house, that the state governments were absolutely necessary to the existence of the federal government. They considered them as the great massy pillars on which this political fabric was to be extended and supported; and were fully persuaded that, when they were removed, or should moulder down by time, the general government must tumble into ruin. A very little reflection will show that no department of it can exist without the state governments."
>
> *Elliott's Debates,* Vol. IV, pp. 59, 58.

Iredell said:

> "The very existence of the general government depends on that of the state governments. The state legislatures are to choose the senators. Without a Senate there can be no Congress. The state legislatures are also to direct the manner of choosing the President. Unless, therefore, there are state legislatures to direct that manner, no President can be chosen. The same observation may be made as to the House of Representatives, since, as they are to be chosen by the electors of the most numerous branch of each state legislature, if there are no state legislatures there are no persons to choose the House of Representatives. Thus it is evident that the very existence of the general government depends on that of the state legislatures, and of course, that their continuance cannot be endangered by it."
>
> *Elliott's Debates,* Vol. IV, p. 53.

Pendleton, in the Virginia Convention, observed:

> "Unless, therefore, there be state legislatures to continue the existence of Congress, and preserve order and peace among the inhabitants, this general government, which gentlemen suppose will annihilate the state governments, must itself be destroyed."
>
> *Elliott's Debates,* Vol. III, p. 40.

> "Nothing is clearer", said Sumner, in the Massachusetts debates, "than that the existence of the legislatures in the different states is essential to the *very being* of the general government."
>
> *Elliott's Debates,* Vol. II, p. 64.

Wilson said:

> "Unless there be legislatures to appoint electors, the President cannot be chosen: the idea, therefore, of the existing government of the states, is presupposed in the very mode of constituting the legislative and the executive departments of the general government. * * *
>
> "I have already shown that the President and Senate cannot exist without the existence of the state legislatures. Have I misstated anything? Is not the evidence indisputable, that the state governments will be preserved or that the general government * * * must tumble amidst their ruins?
>
> "The legislative department is subdivided into two branches—the House of Representatives and the Senate. Can there be a House of Representatives in the general government, after the state governments are annihilated? Care is taken to express the character of the electors in such a manner, that even the popular branch of the general government cannot exist unless the governments of the states continue in existence."
>
> *Elliott's Debates,* Vol. II, pp. 439, 438.

Luther Martin, in one of the debates on the necessity of the two branches in the Federal Legislature, expressed the view

> "* * * that the people of the states, having already vested their powers in their respective legislatures, could not resume them without dissolution of their governments."
>
> *Elliott's Debates,* Vol. V, p. 218.

Madison said that in the proposed plan of government the Legislatures of the States were an essential feature. He pointed out the difficulty of electing to the Legislature of a great republic, representatives who will at once be the representatives of the local interest of all those who choose them, and still be fit to comprehend and pursue great and national objects.

> "The Federal Constitution forms a happy combination in this respect; the great and aggregate interest being referred to the national, the local and particular to the State legislatures."
>
> *Federalist* No. 10, *Ham. Wks.* XI, p. 76.

Hamilton, speaking in New York of the State Governments and their relation to the Federal Government, said:

> "The blow aimed at the members must give a fatal wound to the head."
>
> *Elliott's Debates,* Vol. II, p. 353.

And Madison, in No. 45 of the *Federalist, Ham. Wks.,* Vol. XI, p. 382, expressed himself as follows:

> "The state governments may be regarded as constituent and essential parts of the federal government; while the latter is in no wise essential to the

> operation or organization of the former; without the intervention of the state legislatures, the President of the United States cannot be elected at all. * * * The Senate will be elected absolutely and exclusively by the state legislatures."

And in his luminous style he demonstrates the dependence of the federal upon the State organization.

As was pointed out in *People v. Sours,* 31 Colo. 369, 74 Pac. 167:

> "Under the constitution of the United States, the state governments must be preserved throughout the entire state."

No part of the State Governments is so closely interwoven with the Federal Constitution as are the Legislatures. And we contend that the attempted assumption by the people of the powers of their Legislatures would *pro tanto* violate our national scheme of government and our Federal Constitution.

2.

THE DIVISION OF POWERS OF THE THREE DEPARTMENTS IN EACH OF THE STATES IS A PREREQUISITE TO THE NATIONAL GOVERNMENT.

The qualifications requisite for electors of the most numerous branch of the State *Legislature* determine the qualifications for electors of the national House of Representatives. (*U. S. Const.,* Art. I, Sec. 2.)

The *Legislatures* of the States shall choose the Senators of the United States. (Art. I, Sec. 3.)

The *Legislatures* shall prescribe the times, places and manner of holding elections for Senators and Representatives. (Art. I, Sec. 4.)

The acquisition by the National Government of places for the erection of forts, magazines, arsenals, dockyards and other needful buildings, shall be by purchase from the States with the consent of the *Legislature*. (Art. I, Sec. 8, Clause 17.)

In the election of the Chief Executive of the nation, electors shall be appointed in such manner as the *Legislatures* of the States may direct. (Art. II, Sec. 1, Clause 2.)

In the creation of the States, by the junction of two or more States, or parts of States, the national Legislature shall act with the consent of the *Legislatures* of the States concerned. (Art. IV, Sec. 3.)

In cases of domestic violence within a State, the President shall intervene on application of the *Legislature* of the State. (Art. IV, Sec. 4.)

The power of proposing amendments to the Constitution rests in Congress, or in the *Legislatures* of two-thirds of the States, with ratification by the *Legislatures* of three-fourths of the States, if that mode of ratification is proposed by Congress. (Art. V.)

The members of the *Legislatures* of the States shall be bound by oath or affirmation to support the Constitution and laws of the United States. (Art. VI.)

The Constitution further assumes that each State will maintain an *executive* (Art. I, Sec. 3; Art. IV, Sec. 4), and a *judiciary.* (Art. VI.)

Thus the Constitution assumes the existence in each State of a purely republican form of government, with its powers exercised by the three departments, the continuance of which in the States was, as has been shown, relied upon by the framers of the Constitution.

Minor v. Happersett, supra.

And of this arrangement, Mr. Justice Harlan, in *Taylor v. Beckham,* 178 U. S. 609, said:

> "The cornerstone of our republican institutions is the principle that the powers of government shall, in all vital particulars, be distributed among three separate coordinate departments, legislative, executive and judicial."

In *Kilbourn v. Thompson,* 103 U. S. 168, the following language was used by Mr. Justice Miller:

> "It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to government, whether state or national, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined."

See *Ex parte Virginia, supra.*

And in *Rice v. Foster (supra)* it was said:

> "The sovereign power, therefore, of this State, resides with the legislative, executive and judicial

departments. Having thus transferred the sovereign power, the people cannot resume or exercise any portion of it. To do so would be an infraction of the constitution and a dissolution of the government."

James Iredell, later a Justice of this Court, said:

"The best writers and all the most enlightened part of mankind agree that it is essential to the preservation of liberty that such distinction and separation of powers should be made."

Elliott's Debates, Vol. IV, p. 73.

Monroe in *"The People the Sovereigns"*, at pp. 200-203, discusses the result of uniting government with the sovereign power. "When the government is united with " the sovereignty there can be no checks whatever on " the government." He goes on to say:

"When these two powers are united in the people there can be no regular division of power into three branches distinct and independent of each other. The whole will be in one body, that is, in the General Assembly of the People, who will control every measure of every department. Thus all the powers of government, legislative, executive and judicial, will be concentrated in the same body, a concentration which all political writers agree is despotic, and which experience has shown is not less so when united in the people, by the abuses inseparable from it than in one individual, and for a reason which must strike the common sense of all mankind, that in the latter instance the individual when his acts are oppressive will have the whole people against him; whereas in the other the majority will stand together and support each other."

Indeed, as has been frequently pointed out, if the people may reserve to themselves the exercise of the power of legislation, so they may the executive and judicial powers. What would result?

> "Are we not taught by reason", said Randolph, "experience and governmental history, that tyranny is the natural and certain consequence of uniting these two powers or the legislative and judicial powers exclusively in the same body? * * * Whenever any two of these three powers are vested in one single body they must at one time or other terminate in the destruction of liberty."
>
> Randolph—*Elliott's Debates,* Vol. III, p. 83.

3.

IT IS EVIDENT THAT UNDER THE CONSTITUTION THE STATE LEGISLATURES ARE THE AGENCY TO CARRY ON THE RELATIONS BETWEEN THE NATION AND THE STATES.

Thus the right to vote for State legislators is the test of the right to vote for congressmen. (*Const.*, Art. I, Sec. 2.)

That test the Oregon amendment destroys.

It cannot be said that the constitutional requirement is met, where the members of the State Legislature for whom the electors vote are such only in name, where the functions which the word "Legislature" implies—authority and power to make the laws—have been placed in the hands of the people. The purpose of the framers of the Constitution is manifest. Those who were entrusted with the ballot in the selection of members of State legislative assemblies were to take part in the composition of the national Legislature.

On what theory could electors, unable to choose satisfactory representatives for legislation in State affairs, elect the members of the national House of Representatives?

It was several times pointed out during the debates on the adoption of the Constitution that the national suffrage depended upon the election of State Legislatures.

Davie said:

> "Who are to vote for the federal representatives? Those who vote for the state representatives. If the state government vanishes, the general government must vanish also. This is the foundation on which this government was raised, and without which it cannot possibly exist. * * * "
>
> *Elliott's Debates,* Vol. IV, p. 58.

General Brooks, in the Massachusetts Convention, said:

> "In the second place, it is impossible the general government can exist, unless the governments of the several states are forever existing; as the qualifications of the electors of the federal representatives are to be the same as those of the electors of the most numerous branch of the state legislatures."
>
> *Elliott's Debates,* Vol. II, p. 100.

Wilson argued that the national right of suffrage is the fundamental right of the citizen in a republic, resting under the Constitution upon the exercise of the right of suffrage in the election of State Legislatures. He said:

"In this system, it is declared that the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature. This being made the criterion of the right of suffrage, it is consequently secured, because the same Constitution guarantees to every state in the Union a republican form of government. The right of suffrage is fundamental to republics."

Elliott's Debates, Vol. II, p. 482.

Section 3, Article I, of the Constitution, provides that the Senate of the United States shall be composed of senators from each State, chosen by the Legislature thereof, for six years.

It is, of course, beyond question that the people of a State cannot, under the Federal Constitution, by direct vote elect the national Senators. As shown below, the term "Legislature" in the Constitution means an *assembly of representatives*. Were it otherwise, the voters of Oregon, as a part of its Legislature, would be necessary agents in the election of the Senators of that State—illustrating the incongruities which would arise from the introduction into our Government of the principle of direct legislation by the people.

If the initiative amendment to the Constitution of Oregon is valid, there is in Oregon no Legislature, no assembly vested with the *power* of making laws, no *body* authorized to elect the national Senators. The Legislative Assembly cannot elect them because it is not the Legislature or law-making power of the State; the people cannot elect them, for they are not an assembly of legislators.

It has been declared by the Supreme Court of Oregon that under the initiative "there remains, as formerly, but one legislative department of the State". "And", says the Court,

> "by the adoption of the initiative and referendum into our constitution, the legislative department of the State is divided into *two separate and distinct law making bodies.*" (Italics ours.)
>
> *Straw v. Harris,* 54 Ore. 424; 103 Pac. 777.

Which of these bodies is the Legislature?

Is it claimed that the Legislative Assembly of the State of Oregon continues to be its Legislature in everything but in the power of making laws?

Are those whom the people of the State themselves select, but will not trust with the administration of government and the enactment of laws, competent to choose the Senate of the United States? It is submitted that such an arrangement is an evasion of the provision of the Constitution of the United States regarding the election of Senators and in this connection we observe that the powers "reserved to the people" by the amendment to the Constitution of Oregon extend to every act of every nature; at their will the Legislative Assembly of the State becomes an empty form.

We are aware that in Oregon the people now undertake at the polls to dictate the appointment of United States Senators. It may, therefore, be answered that in effect the Legislature of Oregon does not today choose the senatorial representatives of the State. But the constitutionality of direct legislation cannot of course, be supported by reliance on a practical violation of the

Constitution in another particular. Under the Constitution the Legislature must elect the Senators, and the Legislature may not, therefore, be eliminated from the State.

In Section 8 of Article I of the Federal Constitution is found the provision that Congress may, with the consent of the "Legislature" of the State, purchase places within the State to be used for forts, arsenals, *etc.* It has been held that a constitutional convention cannot agree to such a purchase, for it is not a "Legislature". (*Op. Atty.-General,* XII, 428.) Who, under the Oregon amendment, is it that now gives that consent? The people? They are not its Legislative Assembly or Legislature. The Legislative Assembly? It is not the law-making power or Legislature.

Section 4 of Article I of the Federal Constitution empowers the State Legislatures to prescribe the times and places and manner of holding elections for Senators and Representatives in the Congress of the United States. Section 1 of Article II gives to the Legislature the power of directing the manner in which the States shall appoint electors for the election of the President and Vice-President of the United States.

In *McPherson v. Blacker,* 146 U. S. 1, the power of the Legislature of the State of Michigan to provide for the appointment of electors by congressional districts within the State was under consideration. The Court, speaking of these provisions of the Federal Constitution, said:

> "The Constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors. It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object."

Section 3 of Article IV makes the junction of States dependent upon the will of the State Legislature.

Section 4 of Article IV empowers the State Legislature to apply for Federal protection against domestic violence.

Which of the "two separate and distinct law making bodies" of the "legislative department of the State of Oregon" will exercise the functions conferred by these provisions upon State Legislatures? Will it be the Assembly? Or if the people choose to make all the laws for the State, will it be the latter?

What, if the Legislature of the State had no practical existence, would become of the power to invoke Federal aid to protect the State against domestic violence? As already said, if the people may legislate, they can also exercise the powers of the executive. Hapless would be the minority in a State where the right to appeal to the national Government for protection against a rioting mob lay in the hands of the rioters! Is it not against the force of numbers that the Federal Government under the Constitution agrees to preserve the lives, liberty and property of the citi-

zens of each State? The cases above all others in which the Legislature or Executive of a State would need to invoke Federal aid would be those in which that aid would be required to curb the violence of a lawless majority. During the disturbances in Nevada the mine owners of that State would have had but little hope for the protection of the Federal troops if their presence awaited a call from the majority of the people of that State. Yet, if the proponents of initiative legislation be consistent, they will concede that no function of government is higher than the power to make the law, and that if constitutionally this power may be placed in the hands of the people, so may every other part of the government.

It must be borne in mind that under the Oregon amendment the people may propose and enact any law, and may "reject at the polls any act of the Legislative "Assembly".

The people are thereby vested with authority to nullify all acts of the Legislative Assembly, including those passed in the performance of its functions under the Federal Constitution.

Thus, the Legislature of the State might prescribe that elections for representatives should be held in November; the people might enact that no elections should be held in that month. The Legislature might provide for the use of the Australian ballot in the elections of representatives to Congress; the people by initiative law could prohibit the use of the Australian ballot in any election in the State of Oregon. The Legislative As-

sembly of the State might consent to the purchase by the United States Government of State lands for the use of a military reservation; the people by initiative law might reserve the same land for a public park.

In other words, the people, if they chose, could exercise their powers in direct hostility to the enactments of the Legislative Assembly. A harmonious system of legislation, not only in those affairs which affect the nation, but in matters of State interest as well, would depend on the whims of the people and on the motives of those leaders who would soon learn to frame and control initiative petitions and to wield the vote, or the greater part of the vote, of the State.

The powers conferred by the Federal Constitution upon the State Legislatures are attributes of the sovereign law-making power of the States. They illustrate the dependence of the national Government upon the structure of the State Governments. But these functions which, under the Federal Constitution, are to be exercised by the State Legislatures, are but adjuncts to their normal powers. To deprive Legislative assemblies of the law-making powers and to maintain them for the purpose of exercising the powers reposed in the State Legislatures by the national Constitution, would be a subterfuge, an ostensible adherence to the letter of the Constitution, but a plain violation of its spirit and purpose.

The Oregon amendment would undermine and overthrow the one feature of State government upon which,

more than any other, rests the national structure—the State Legislature.

4.

THE WORD "LEGISLATURE" IN THE CONSTITUTION MEANS A REPRESENTATIVE ASSEMBLY CONSISTING OF TWO HOUSES, EMPOWERED TO MAKE THE LAW. SUCH WAS ITS MEANING AT THE TIME OF THE ADOPTION OF THE CONSTITUTION.

The Constitution requires of each State the maintenance of a Legislature which, first, shall exercise certain functions; which, second, shall be a legislative assembly supreme within the sphere of its delegated powers, and which, third, shall consist of at least two houses.

The Constitution itself furnishes the meaning of the word "legislature". Thus Article VI of the Federal Constitution provides that the *members of the several State Legislatures* shall take an oath to support the Constitution of the United States and the laws thereof.

It is manifest from this provision that the framers of the Federal Constitution understood the word "legislature" to mean an *assembly* making the laws.

Pursuant to Article VI of the Constitution Congress, by the Act of June 1, 1879 (Stat. at Large, Vol. I, p. 23, Section Three thereof) required the members of the several State Legislatures to take the oath prescribed by Section One of the Act before proceeding to their duties.

Under the initiative amendment this clause of the Constitution and the provisions of the Act of 1789 would

have little meaning. There would be in effect an assembly styled a legislature taking the oath, and a body of voters making the laws.

Furthermore, the meaning of the word "legislature" as used in the Constitution, was well defined at the time the Constitution took effect.

Words and terms are to be taken in the sense in which they were used when the Constitution was adopted.

Veazie Bank v. Fenno, 8 Wall. 542;
Locke v. New Orleans, 4 Wall. 172;
U. S. v. Harris, Abb. U. S. 110;
U. S. v. Block, 4 Saw. 211.

Constitutional provisions are to be expounded in the light of conditions existing at the time of their adoption in connection with former provisions and historical facts relating to the origin of our political institutions and the practice under them.

Fox v. McDonald, 101 Ala. 51.

The States all had their representative legislative bodies at the time of the adoption of the Constitution.

> "In all of the states the form of government was that of republic with the supreme legislative power vested in a representative assembly."
>
> *Bancroft Hist. of U. S.*, IX, 260 *et seq.*

And see *supra* paragraph IV, sub. 5.

In the *Century Dictionary* a legislature is defined as:

> "A body of law-makers, an assemblage of men vested with the power of making, repealing or

changing the laws of a country or state, and of raising and appropriating its revenues. Any body of persons authorized to make laws or rules for the community represented by them."

Prof. March defines a Legislature as:

"*The body* of men in a state having the power to enact or repeal laws." (Italics ours.)

Thesauraus, p. 589.

In *Evansville v. The State,* 118 Ind. 426, 441, the Court, in discussing the meaning of the terms "legislative" and "legislature", said:

"The word 'legislative' is defined by Worcester as follows: 'That which makes or enacts laws; lawmaking; legislative power; of or pertaining to legislation or to a legislature, as, legislative proceedings.' 'Legislative' is defined by Zell as follows: 'Making, giving, or enacting laws; relating or pertaining to the passing of laws'. Webster defines 'legislative' as follows: 'Giving or enacting laws, as, a legislative body; pertaining to the enacting of laws; suitable to laws, as, the legislative style; done by enacting, as, a legislative act'. Wharton, in his Lexicon, defines 'legislation' as follows: 'The act of giving or enacting laws'. 'Legislature': 'The power to make laws'. Abbott, in his Law Dictionary, under the head of 'Legislate', has the following 'To make laws. "Legislature": The body of persons in the state clothed with authority to make laws'. 'Legislative power': 'That one of the three great departments into which the powers of government are distributed—legislative, executive, and judicial—which is concerned with enacting or establishing, and, incidentally, with repealing, laws'."

5.

CONTEMPORANEOUS LEGISLATION BY CONGRESS SHEDS SOME LIGHT ON THE MEANING OF THE TERM "LEGISLATURE" AS USED IN THE CONSTITUTION.

It is provided in Article IV, Section 1, of the Constitution, that:

> "Full faith and credit shall be given in each state to the *public acts,* records and judicial proceedings of every other state. And the Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

The original draft of Article IV, Section 1, read

> "Full faith shall be given in each state to the acts of *the legislature* * * * of every other state."
>
> *Elliott's Debates,* Vol. V, p. 132.

The Committee on Detail so reported the resolution,

Eiliott's Debates, Vol. V, p. 381.

On consideration of the report the clause was referred to a committee which changed the language to conform to that of the corresponding provision in the Articles of Confederation.

Ib., Vol. V, pp. 488, 504.

In the Articles of Confederation the provision read:

> "Full faith shall be given in each of these states to the records, *acts* * * * of every other state."
>
> *Elliott's Debates,* Art. IV, Vol. I, p. 80.

And so the clause remained.

Thereupon, Congress, in 1790, enacted a statute that

> "The *acts of the legislature* of any state or territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such state, territory or country affixed thereto."
>
> *Stat. at Large,* May 26, 1790, vol. I, p. 122.

It is apparent that the change made in the original draft of the provision was interpreted by Congress to be in the style, rather than in the meaning, and that the *public acts of the State,* so far as these were legislative, were conceived to be the *acts of its Legislature.*

Under the Statute of 1790 the acts of the Legislature of the State of Oregon are given full faith and credit throughout the United States. If the Legislative Assembly of that State can still be said to be its Legislature, its enactments will be received as the law of Oregon in the sister States of the Union; but, the statutes initiated and enacted by the people, being the acts of no legislature, are entitled to no recognition beyond the limits of the State of Oregon.

So that the enactments of one "branch of the legislative department" of the State of Oregon will be recognized as the law of the State of Oregon in other States of the Union; whereas such recognition cannot be enforced for the enactments of the "coordinate legislative body", the other branch of the legislative department of the State.

Plainly, such a condition of affairs would introduce a strange discord into our polity, and exemplifies again

the repugnance of the initiative to the conditions of our Government.

6.

THE INITIATIVE DESTROYS THE LEGISLATIVE ASSEMBLIES OR LEGISLATURES WHICH IT IS THE IMPLIED OBLIGATION OF EACH STATE TO MAINTAIN, FOR A LEGISLATURE MUST BE THE LAW-MAKING POWER.

Unless supreme within its jurisdiction a legislative assembly is not a Legislature.

Blackstone said:

> "It is of the very essence of a law that it is made by the supreme power. Sovereignty and legislature are indeed convertible terms; one cannot subsist without the other."
>
> *Com.*, Vol. I, p. 46.

> "There is", says *Dicey*, "a logical and practical impossibility of combining absolute legislative authority with restrictions on that authority which would make it cease to be absolute."
>
> *Law of the Const.*, p. 66.

> "The essence of legislative authority", said Hamilton, "is to enact laws."
>
> *Federalist*, No. 75.

> "What is legislation but a form of making the laws?"
>
> *Federalist*, No. 33.

Under the Oregon amendment the people have equal powers of legislation in general matters with the legislative assembly of the State. The latter then ceases to be the law-making power, or Legislature.

Two co-ordinate legislative authorities, each with equal power of making, repealing and amending laws, would be political anarchy and chaos. This was pointed out in *Ex parte Anderson*, 134 Cal. 73, where the Court said:

> "It is too plain to admit of argument, that, under our system of government, there never can be two equal, co-ordinate law-making powers, each existing without any restrictions the one upon the other. Yet such is the precise case presented and apparent from an inspection of the sections of the constitution and of the County Government Act above quoted. Upon the one hand, there is conferred upon the board of supervisors, as has been the universal rule, full power to make all laws pertaining to the government of the county. Upon the other hand, this identical power is bestowed by the machinery of the ballot upon the voters of the county. When an ordinance is thus passed by ballot, it has no superior force, but has merely 'the same and equal force and effect as though adopted and ordained by the board of supervisors'. The right of the supervisors to repeal such ordinances is not taken away, and it is within their power to repeal them one after the other as soon as they shall have been adopted. Upon the other hand, it is equally the right of the people to re-enact them after such repeal. It is the old problem of the irresistible force meeting the indestructible barrier. So far as legislation is concerned, nothing could result but untold confusion. As the two sets of laws, thus creating co-ordinate law-making powers, without check, limitation, or restraint, the one upon the other, cannot, in the nature of our government, exist, it follows that one or the other of the provisions is invalid and must fall." Henshaw, J.

That the power of direct legislation by the people leads logically to the elimination of the State Legisla-

tures as the law-making power is stated in *People v. Collins (supra)* 3 Mich., at p. 368. Speaking of the referendum, the Court used these words:

> "In view of such a state of things, what is to be the final result and end of this kind of legislation? Our boasted system of representative government is to be perverted, and a *collective democracy*, the most uncertain and dangerous of all governments, to be arbitrarily substituted in its stead. Such must be the inevitable result and end of such legislation; for if the legislature can take this step, and pass one law in this way, it can, beyond all controversy, pass every other law in the same way. The legislative department of the government, therefore, instead of being the law-making power, under the Constitution, becomes a self-constituted body, merely to frame bills for the electors of the state, *collectively* to pass or reject, by a vote at the elections, and as they may from the spur of the moment, or without much thought or reflection, deem proper."

And in *Rice v. Foster (supra)* the Court said of the referendum:

> "The General Assembly will become a body merely to digest and prepare legislative propositions; and their journals a register of bills to be submitted to the people for their enactment. Finally, the people themselves will be overwhelmed by the very evils and dangers against which the founders of our government so anxiously intended to protect them; all the barriers so carefully erected by the Constitution around civil liberty, to guard it against legislative encroachments, and against the assaults of vindictive, arbitrary and excited majorities, will be thrown down; and a pure democracy, 'the worst of all political evils' will hold its sway under the hollow and lifeless form of a republican government." (4 Harr. 499.)

It is not contended that the Legislature of a State must be vested with the supreme power of government. It is conceded that the people of a State may, by popular vote, make the fundamental law. Such has been the uniform practice in our country. The extent of the statute-making power, the field of its jurisdiction, may, under our form of government, be enlarged or diminished by the constituent law-making power—the people. But it is maintained that within its sphere a Legislature must be supreme, or it ceases to be such.

> "Limited sovereignty * * * ", says Dicey, "is a contradiction in terms."
>
> *Law of Const.*, p. 66.

It is true that in our Government all sovereign power is in the people. More accurately speaking, it is in that body which, under our Federal Constitution, can amend that instrument. But this is a political and not a legal fact. No law would be declared unconstitutional by our courts, because opposed to the will of a majority of the voters.

It has been observed by Burke and other writers, that a representative legislative Government as well as a pure democracy must, in the last instance, reflect the will of the majority of the governed. To sustain the theory of supremacy of the Legislature in our system of government it is not necessary to deny that the sovereign power reposes with the majority. Even the sovereignty of the Parliament of the United Kingdom of Great Britain and Ireland must be, as it actually is, exercised in accordance with the will of its subjects.

In elective representative governments divergencies between the Legislature and the people are eliminated by the ballot. But, to forestall such differences, or to eradicate them by the substitution of a higher legislative authority, to wit: the people *en masse,* is to deprive the minority of a voice and of its right to be heard in accordance with the forms of republican government, and is the destruction of representation in government.

In *Ex parte Farnsworth,* 135 S. W. 535, it was said:

> "laws must be enacted by the legislature. This doctrine also flows from the very framework of our form of government. It is the basic principle and theory of republican form of government as set out in the Constitution."

In *Baltimore v. State,* 15 Md. 376, the Court expressed this idea as follows:

> "According to the theory on which our State Government is founded, the people are recognized as the source of all governmental power. They are, in this sense, the true and only sovereigns. For their own good, they have authorized a body, chosen by themselves, to exercise, under certain prescribed limitations, the supreme power. This body is known, in common parlance, as the legislature, and, except in cases prohibited either by the Constitution of the United States, or that of the State, is as free and competent to act in the passage of binding and effective laws as would be the people themselves, if they were acting in their primary and sovereign capacity as a pure democracy, restrained only by their sense of justice and expediency."

It is asserted by proponents of the initiative that by giving to the Legislative Assembly the power to repeal any initiative measure passed by the people, the republican form of government is preserved.

This suggestion was made by the Supreme Court of Oregon in the case of *Kadderly v. Portland,* 74 Pac. 710; 44 Or. 118. It was there said:

> "No particular style of government is designated in the Constitution as republican, nor is its exact form in any way prescribed. A republican form of government is a government administered by representatives chosen or appointed by the people or by their authority."

The Court further finds that:

> "Under this amendment, it is true, the people may exercise a legislative power, and may, in effect, veto or defeat bills passed and approved by the legislature and Governor; but the legislative and executive departments are not destroyed, nor are their powers or authority materially curtailed. Laws proposed and enacted by the people under the initiative clause of the amendment are subject to the same constitutional limitations as other statutes, and may be amended or repealed by the legislature at will." *

Such a "system" of government does not, we submit, meet the Court's definition of a "republican form". Not only have the people the veto power on the acts of the Legislature, but it is not to be believed that a

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* The decision in the Kadderly case was written before the adoption of the amendment of 1910 providing that tax measures should not be subject to the restrictions of the state constitution. (See supra, par. I.)

Legislature holding office from the people would repeal the enactments of its electors.

The Oregon amendment therefore eliminates the principle of representation from the highest function of government—legislation.

In Oklahoma, the framers of the proposed Constitution frankly admitted that the provision giving the Legislature "power to repeal initiative laws" was inserted with the expectation that no Legislature would ever exercise such power—illustrating the extent to which proponents of the initiative expect the legislative power of the Assembly to be actually destroyed by the provisions for direct legislation.

And in Oregon no bill regulating taxation can become a law until approved by the people at a general election (*supra,* par. I).

As said before, in practice an elective representative Legislature must in the last resort enact legislation in accordance with the will of the people. But this is far different from the enactment by the people of legislation which the Legislature will not dare to repeal. In the one case the voice of the people is molded by and expressed by the people's representatives; in the latter case the representatives become figure-heads—impotent to assist or moderate or guide the expression of the popular will.

To paraphrase a famous paragraph from the writings of Sir Henry Maine: The British Parliament legislates and rules—Congress legislates, but does not rule—.

It would remain for the Legislative Assembly of Oregon neither to legislate nor to rule.

7.

THE INITIATIVE OVERTHROWS ONE OF THE GREATEST SAFEGUARDS AGAINST THE ABUSE OF THE POWER OF LEGISLATION, TO WIT: THE SYSTEM OF A DUAL LEGISLATIVE ASSEMBLY.

The provision in the Federal Constitution, Article I, Section 2, prescribing the qualifications for electors of the National House of Representatives implies the existence in each State of at least two houses for the enactment of legislation. Thus the "electors in each "state" of "the members of the House of Represen- "tatives" shall have the qualifications requisite for the *most numerous branch* of the State Legislature. The bicameral system engrafted on the National Government is part of the form of our State Government. It was in operation in all the States of the Union but one.

Elliott's Debates, Vol. V, p. 217.

In the debates on the advisability of having the Congress consist of two houses, even those who favored a single chamber for the National Legislature admitted the necessity of the dual assembly in State Legislatures. Thus, Sherman, who argued for a single national council

> "admitted two branches to be necessary in the state legislatures".

Elliott's Debates, Vol. V, p. 218.

"Wilson urged the necessity of two branches; observed that if a proper model was not to be found in other confederacies it was not to be wondered at."

Ib., Vol. V, p. 219.

And see

Elliott's Debates, Vol. II, p. 198.

Mason is thus reported:

"He believed the mind of the people of America as elsewhere was unsettled as to some points but settled as to others. In two points he was sure it was well settled—first, in attachment to republican government; secondly, in an attachment to more than one branch in the legislature."

Ib., Vol. V, p. 216.

"The necessity of a Senate is not less indicated by the propensity of all single and numerous assemblies to yield to the impulse of sudden and violent passions * * *"

Federalist No. 63, *XII Hamilton's Works*, p. 129.

James Iredell, in the South Carolina Convention, said:

"I believe, sir, it was the general sense of all America, with the exception only of one state, in forming their own state constitutions, that the legislative body should be divided into two branches, in order that the people might have a double security. It will often happen that, in a single body, a bare majority will carry exceptionable and pernicious measures. The violent faction of a party may often form such a majority in a single body, and by that means the particular views or interests of a part of the community may be consulted, and those of the rest neglected or injured. Is there a single gentleman in this convention, who

has been a member of the legislature, who has not found the minority in the most important questions to be often right? Is there a man here, who has been in either house, who has not at some times found the most solid advantages from the cooperation or opposition of the other? If a measure be right which has been approved of by one branch, the other will probably confirm it; if it be wrong, it is fortunate that there is another branch to oppose or amend it."

Elliott's Debates, Vol. IV, p. 38.

Hamilton, speaking in the New York Convention, said:

"From these principles it follows that there ought to be two distinct bodies in our government—one which shall be immediately constituted by and peculiarly represent the people, and possess all the popular features; another formed upon the principle and for the purposes before explained. Such considerations as these induced the convention who formed your state constitution to institute a senate upon the present plan. The history of ancient and modern republics had taught them that many of the evils which these republics suffered arose from the want of a certain balance and mutual control indispensable to a wise administration; they were convinced that popular assemblies were frequently misguided by ignorance, by sudden impulses, and the intrigues of ambitious men, and that some firm barrier against these operations was necessary; they, therefore, instituted your senate, and the benefits we have experienced have fully justified their conceptions."

Elliott's Debates, Vol. II, p. 302.

That the power of direct legislation, when vested in the people, deprives the State of the protection of a dual

legislative chamber, was forcibly expressed in *People v. Parker,* 6 Barr. 507. The Court said:

> "For an Assembly of two branches designed to hold each other in check, the smaller body being composed of members of an age greater than that required to give the right of suffrage, and the proceedings of both subject to the veto of an executive officer of still more matured years than the senator, will be substituted a mass of votes of every variety of mental capacity and training, many of whom may have barely attained the legal age of twenty-one years, from whose decision no appeal lies but to themselves, and whose action is subject to no veto." (p. 519.)

The advantages of the two-chamber system are shown by Story. It is a safeguard against undue, hasty and oppressive legislation; it lessens the danger from the efforts of demagogues; it leads to better consideration and a wiser character of the laws, and a greater stability in legislation.

> "A senate", says Story, "duly constituted, would not only operate as a salutary check upon the representatives, but occasionally upon the people themselves, against their own temporary delusions and errors. The cool, deliberate sense of the community ought in all governments, and actually will, in all free governments, ultimately prevail over the views of their rulers. But there are particular moments in public affairs when the people, stimulated by some irregular passion or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn. In these critical moments how salutary will be the interference of a body of respectable citizens, chosen without reference to the

> exciting cause, to check the misguided career of public opinion, and to suspend the blow, until reason, justice and truth can regain their authority over the public mind. It was thought to add great weight to all these considerations that history has informed us of no long lived republic which has not a senate."
>
> *1 Story,* pp. 419, 420.

And see

Cooley, Const. Lim., p. 187.

It needs no argument to show that the necessity of a check upon a single body is twofold, when considered with reference to the mass of voters of the State as legislators. The dangers of initiative legislation have already been pointed out; the matter is here referred to, to show that direct legislation again violates a fundamental tenet of our Government—the provision for two houses of legislation.

VI.

THE PROVISION IN THE OREGON CONSTITUTION FOR DIRECT LEGISLATION VIOLATES THE PROVISIONS OF THE ACT OF CONGRESS ADMITTING OREGON TO THE UNION.

The preamble of the Act of Admission provides:

> "Whereas, the people of Oregon have formed, ratified and adopted a constitution of state government which is republican in form, and in conformity with the Constitution of the United States, and have applied for admission into the Union on an equal footing with other states; * * *"
>
> *Act of Congress,* Feb. 14, 1859.

At the time Oregon was admitted to the Union her Constitution was republican in form.

No law should take effect upon any authority except that provided in the Constitution, to wit: the Legislative Assembly. (Art. I, Sec. 21.)

The powers of government were divided into the three departments. (Art. III, Sec. 1.)

Legislative authority was vested in an assembly of representatives, the governor having a qualified veto. (Art. IV, Sec. 1, Art. V, Sec. 15.)

The preamble of the Act of Admission states the condition upon which the State of Oregon was admitted to the Union. It has been shown with sufficient particularity that this condition is violated by a government exercised directly by the people. But the terms of that condition are perpetual and unchangeable.

It was said in *Romine v. State,* 34 Pac. 925:

> "The Act of Congress which enables a territory to come into the Union as a State usually contains

> many provisions which, upon the admission of the state, become inviolable, either by the state or the United States."

In *People v. Adams,* 73 Pac. 866 (Colo.), the Court speaks of the

> "republican form of government which the state is obliged to maintain under its compact with the federal government as evidenced by the enabling act".

The State of Oregon was admitted because its proposed government was republican. The implied contract was that the State would continue that form. Every person within the State is entitled to that form of government. The State cannot secede from the Union. A change in its fundamental law, repugnant to republican institutions, is contrary to the Act of Congress admitting the State, and is an impairment of the obligation of the State to preserve a republican form of government.

Conclusion.

The question is submitted with confidence that this Court will protect the people in the enjoyment of those constitutional checks and safeguards against their own power which with wisdom and deliberation they created for themselves. Injustice and misrule have characterized all unconstitutional democracies and all popular governments administered in accordance with the whims and caprices of the multitude.

"Happy is that country," said a well known writer, "whose constitutional system enables it to enjoy the blessings of popular government, while at the same time it is protected from the evils of hasty and passionate legislation. And while, perhaps, the constitutional system of this country has not developed exactly in accordance with the wishes and expectations of Washington, Hamilton, Madison, and their co-workers, yet if it were possible for them to know the results actually achieved, they would be satisfied with the knowledge that they had in a measure succeeded in establishing, what exists nowhere else, a popular government without democratic absolutism."

Tiedeman, Unwritten Const. of the U. S., 164.

It is in the power of this Court to maintain and preserve this Government against the attack of direct legislation and the absolutism of numbers.

We close our argument with the words of Daniel Webster, who, in expressing the belief that not harm but good would come from a celebrated controversy then before this Court, said:

"It will purify the political atmosphere from some of its noxious mists, and I hope it will clear men's minds from unfounded notions and dangerous delusions. I hope it will bring them to look at the regularity, the order, with which we carry on what, if the word were not so much abused, I would call our *glorious* representative system of popular government. Its principles will stand the test of this crisis, as they have stood the test and torture of others. They are exposed always, and they always will be exposed, to dangers. There are dangers from the extremes of too much and of too little popular liberty; from monarchy, or military des-

potism, on one side, and from licentiousness and anarchy on the other. This always will be the case."

And continuing, he concluded:

"The prudence of the country, the sober wisdom of the people, has thus far enabled us to carry this Constitution, and all our constitutions, through the perils which have surrounded them, without running upon the rocks on one side, or being swallowed up in the eddying whirlpools of the other. And I fervently hope that this signal happiness and good fortune will continue, and that our children after us will exercise a similar prudence, and wisdom, and justice; and that, under the Divine blessing, our system of free government may continue to go on, with equal prosperity, to the end of time."

It is respectfully submitted that the judgment should be reversed.

E. S. Pillsbury,
Oscar Sutro,
Attorneys for Plaintiff in Error.

Carey & Kerr,
Pillsbury, Madison & Sutro,
Of Counsel.

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Supreme Court, U. S.
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JAMES H. McKENNEY
Clerk

IN THE

SUPREME COURT OF THE UNITED STATES,

October Term, 1911.

No. 36

PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Plaintiff in Error,

vs.

STATE OF OREGON, Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

W. A. PILLSBURY,
OSCAR SUTRO,
Attorneys for Plaintiff in Error.

CAREY & KEER,
PILLSBURY, MADISON & SUTRO,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 822.

PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY (A CORPORATION), PLAINTIFF IN ERROR,

vs.

STATE OF OREGON, DEFENDANT IN ERROR.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

Preliminary.

The question raised in the opening brief filed on behalf of the plaintiff in error is there stated to be one striking at the foundations of this Government. We endeavored to present to this court the proposition that taxation by direct legislation of the people violated not only various provisions of the Federal Constitution securing to the individual the right to equal laws and due process and to government by representation, but that the initiative contravened the fundamental provisions and principles of the Constitution upon which the Federal Government itself rests. We urged that

the question seriously affected the integrity of our political system. In the reply made by the State of Oregon to that argument there is advanced a proposition no less vital, no less startling. It is said that this court having jurisdiction over the persons of the parties and having jurisdiction over the subject-matter, has yet no jurisdiction over the case because it arises under a clause of the Federal Constitution or under clauses with which this court has no concern. It is argued that though when tested by the provisions of the Federal Constitution a State initiative law may be invalid, this court has no power so to declare if the President, the Congress, and the State judiciary are content. And the most vitalizing feature of our Government, its greatest safeguard against anarchy on one hand and corruption on the other, the supremacy of this court in the interpretation of the fundamental law of the country, is denied, and the court asked to await or follow, as the case may be, the determination and action of the legislative and executive branches of the Government. The position of the defendant in error is that though this cause requires for its decision an interpretation of the Federal Constitution, it is yet not a justiciable controversy nor within the jurisdiction of this court. Neither precedent nor reason can be found for so startling a principle, a proposition no less fundamental and no less subversive than the main controversy itself.

Three clauses of the Federal Constitution at once present themselves to view. The first, "the judicial power shall extend to all cases in law and equity arising under this Constitution," and "the judicial power of the United States shall be vested in one Supreme Court;" the second, that the guarantee of the republican form of government is by the "United States," not by the Chief Executive nor by the Congress, but by the whole Government; the third, that the Constitution is the supreme law of the land. The decisions referred to by the defendant in error in nowise limit the force of these provisions as applied to the jurisdiction of this court.

The Questions Whether the "Measure" in Issue Constitutes Due Process in Law and Affords Plaintiff in Error the Equal Protection of the Law, and Whether This "Measure" in the Method of Its Enactment Violates the Various Provisions of the Federal Constitution Designated in the Opening Brief, are Contentions Which This Court Must Decide in the Exercise of Its Jurisdiction and Are Not Political.

I.

The authorities cited by defendant in error do not sustain the contention that the questions raised in the opening brief are political and not within the jurisdiction of this court.

In support of its contention that the question is political and not judicial, and that therefore the court has no jurisdiction of the cause, the defendant in error cites:

Luther vs. Borden, 7 How., 1.
Texas vs. White, 7 Wall., 730.
Taylor vs. Beckham, 178 U. S., 548.
In re Duncan, 139 U. S., 449, and
Hopkins vs. Duluth, 81 Minn., 189; 83 N. W., 536.

In *Luther vs. Borden*, 7 How., 1, the issue involved the question whether the so-called Dorr government, formed by an alleged majority of the voters of the State in 1842, superseded the government of Rhode Island under its charter as afterwards amended.

The case was argued by Mr. Webster, who took the ground that the court could not take cognizance of the question. This court adopted that view, holding that the inquiry belonged to the political department; that it rested with the political power to decide whether the charter government had been displaced or not; that when that decision was made

the judicial department would be bound to take notice of it as the paramount law of the State, without the aid of oral evidence or the examination of witnesses.

It appeared that the matter had already been decided by the State court of Rhode Island, and this court said:

> "Upon such a question the courts of the United States are bound to follow the decisions of the State tribunals, and must, therefore, regard the charter government as the lawful and established government during the time of the contest."

It was further found that the circuit court's investigation whether or not the Dorr constitution had been adopted by a majority of the people was beyond the field of judicial inquiry. Otherwise decisions of the question, as was pointed out, would rest on the findings of juries, which might vary from case to case. As this court said: "The authority and security of the State governments do not rest on such instable foundations." The court therefore declined to support its jurisdiction on the ground that the establishment of the Dorr government violated the guaranty of a republican form of government, saying that: "Under this article of the Constitution it rests with Congress to decide what government is the *established* one in a State." (Italics ours.)

It is evident that the court here decided only that it would not declare a *de facto* government not to be a government; that the recognition by the political departments of the State and nation of the existence of a State government would bind the Federal Supreme Court; that the findings of fact upon which the conclusion was reached that one faction prevailed as the lawfully constituted authority over another faction would be accepted by the Federal tribunals.

But nowhere is it suggested that the recognition of such a government by the political departments or State courts bound the Federal courts to accept as constitutional all of the acts of that State government or to sustain as constitutional the provisions, regardless of their nature, of its fundamental law.

The whole force and bearing of the decision in *Luther vs. Borden* was epitomized in the case of *In re Duncan*, 139 U. S., 461, one of the four decisions of this court relied upon by the defendant in error. Chief Justice Fuller there said:

> "In *Luther vs. Borden*, 7 How., 1, it was held that the question which of the two opposing governments of Rhode Island, namely, the charter government, or the government established by a voluntary convention, was the legitimate one, was a question for the determination of the political department, and when that department had decided, the courts were bound to take notice of the decision and follow it; and also, that as the Supreme Court of Rhode Island, holding constitutional authority not in dispute, had decided the point, the well-settled rule applied that the courts of the United States adopt and follow the decision of the State courts and questions which concern merely the constitution and laws of the State."

So much was held in *Luther vs. Borden*, and no more. It was nowhere decided that the Federal courts are not a part of the "United States" and bound to uphold the guaranty clause as well as every other provision of the national Constitution.

The decision in *Luther vs. Borden* was considered by the Supreme Court of Iowa in *Koehler vs. Hill*, 15 N. W., 609. The court in that case passed upon the validity of an amendment to the constitution of the State, alleged to have been adopted in violation of the procedure provided by the *State constitution*. Upon rehearing of the case elaborate consideration was given to the contention that the question was political and not judicial. *Luther vs. Borden* was relied upon and examined and analyzed at great length. It was said:

> "The case of *Luther vs. Borden* gives no countenance whatever to the doctrine that the sovereignty of the people extends rightfully to the overturning of the constitutions, and the adoption of new ones without regard to the forms of existing provisions.

> It is true that right under our form of government, exists, but is a revolutionary and not a constitutional right."

And, still speaking of the contention that these questions should be left to the political departments of the Government, the court said:

> "We ought to ponder long before we adopt a doctrine so fraught with danger to republican institutions. All the danger lies in the line of the argument of appellants' attorneys. The courts can never overturn our institutions or subvert our liberties. They command neither the purse nor the sword of the State. But a people which is educated to disrespect the decisions and disregard the adjudications of the courts, is prepared for anarchy, with all its attendant evils and dreadful consequences. We may, perhaps, be excused, if, in the interest of social order and public security, and the permanency of republican institutions, we enter a most earnest protest against the heresies which have been advanced in this case."

The next decision in point of time cited by defendant in error is *Texas vs. White*, 7 Wall., 700. In that case the State of Texas while under provisional government sued for the recovery of bonds of the United States, which were in the State treasury at the outbreak of the war and which were disposed of by the government of the seceding State. Granting the relief sought, this court held that the State of Texas at no time ceased to be a member of the Union.

> "The first and important question was whether Texas was then one of the United States and as such capable of sustaining an original suit in this court by reason of her being such State."
>
> *Keith vs. Clark, infra.*

The court quoted from *Luther vs. Borden* that the *enforcement* of the guaranty of article IV, section 4 is for the political departments of the Government.

But it was decided by a majority of the court, Chief Justice Chase writing the opinion, that by the act of secession Texas *did not cease to be a State. This conclusion was reached, regardless of the course of Congress and of the administrations of President Lincoln and of President Johnson* with respect to the Confederate States. The court held that the Union was indissoluble and the States indestructible, and *refused to follow the decision of the political departments.*

That such was the effect of the decision was pointed out by Mr. Justice Grier, in a dissenting opinion, who said:

> "I can only submit to the fact as decided by the political position of the Government, and I am not disposed to join in any essay to prove Texas to be a State of the Union, when Congress have decided she is not. *It is a question of fact, I repeat, and of fact only.* Politically Texas is not a State in this Union."

And Mr. Justice Swayne said:

> "I concur with my brother, Grier, as to the incapacity of the State of Texas in her present condition to maintain an original suit in this court. *The question, in my judgment, is one in relation to which this court is bound by the action of the legislative department of the Government.* * * * I am authorized to say that my brother, Miller, unites with me in these views."

But the majority of the court held that it was the exclusive province of the courts to determine the legal effect of the acts of secession—a ruling followed in subsequent cases (*White vs. Hart,* 13 Wall., 646; *Keith vs. Clark,* 97 U. S., 461; *Daniels vs. Tearney,* 102 U. S., 418).

The case lends no support to the position that decisions on the constitutionality of State governments are controlled by the acts of the executive or legislative branch of the Federal Government, but makes clearer the distinction between *executive and administrative enforcement* of the guarantee

on the one hand and *judicial interpretation* of the clause on the other hand; and from the language of Mr. Justice Grier it is clear that the minority in *Texas vs. White* dissented on the ground that the question was one of *fact*, upon which the proper political departments had acted. Will it be claimed that in this case the question whether direct legislation violates a republican form of government is a question of fact? What votes are here to be counted, as in *Luther vs. Borden?* What legislative journals to be referred to, as in *In re Duncan?* What legislative canvass to be examined, as in *Taylor vs. Beckham?*

In re Duncan, 139 U. S., 449, is cited and referred to by defendant in error.

In that case the petitioner appealed from a judgment of the Circuit Court of the United States for the Western District of Texas, denying a writ of *habeas corpus* to discharge him from custody, after his conviction in the State courts of the crime of murder. The grounds of the petition were that the penal code under which the petitioner was tried in the State courts had not been adopted pursuant to the requirements of the State constitution. The State court held that the statutes in question had been enacted in accordance with the provisions of the State constitution, and that the Federal courts would not review the findings or decision of the State court in that respect. "This is not the case," said Chief Justice Fuller, in delivering the opinion of the court, "of a system of laws attacked upon the ground of their invalidity as the product of revolution."

And so pertinent to the question here at issue is the language of the Chief Justice in that case, and so clearly does it distinguish that case from the case at bar, that at the expense of repetition we quote the language there used:

> "By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for

governmental administration, and pass their own laws *in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves;* but, while the people are thus the source of political power, their governments, *National and State, have been limited by written constitutions, and they have themselves thereby set bounds to their own powers, as against the sudden impulses of mere majorities.*

"In *Luther vs. Borden,* 7 How., 1, it was held that the question which of the two opposing governments of Rhode Island, namely, the charter government, or the government established by a voluntary convention, was the legitimate one, was a question for the determination of the political department, and when that department had decided, the courts were bound to take notice of the decision and follow it; and also that, as the Supreme Court of Rhode Island, holding constitutional authority not in dispute, had decided the point, the well-settled rule applied that the courts of the United States adopt and follow the decisions of the State courts on questions which concern merely the constitution and laws of the State. Mr. Webster's argument in that case took a wider sweep, and contained a masterly statement of the American system of government, as recognizing that the people are the source of all political power, but that as the exercise of governmental powers immediately by the people themselves is impracticable, they must be exercised by representatives of the people; that the basis of representation is suffrage; that the right of suffrage must be protected and its exercise prescribed by previous law, and the results ascertained by some certain rule; that through its regulated exercise each man's power tells in the constitution of the government and in the enactment of laws; that the people limit themselves in regard to the qualifications of electors and the qualifications of the elected, and to certain forms for the conduct of elections; that our liberty is the liberty secured by the regular action of popular power, taking place and ascertained in accordance with legal and authentic modes; and that the Constitution and laws do not proceed on the ground of revolution or any right of

> revolution, but on the idea of results achieved by orderly action under the authority of existing governments, proceedings outside of which are not contemplated by our institutions. Webster's Works, vol. 6, p. 217.
>
> "Discursive as are the views of petitioner's counsel, *no violation of these fundamental principles in this instance is or could be suggested.*
>
> "The State of Texas is in full possession of its faculties as a member of the Union, and its legislative, executive and judicial departments are peacefully operating by the orderly and settled methods prescribed by its fundamental law. Whether certain statutes have or have not binding force, it is for the State to determine, *and that determination in itself involves no infraction of the Constitution of the United States, and raises no Federal question giving the courts of the United States jurisdiction.*
>
> "We cannot perceive that petitioner is being otherwise dealt with than according to the law of the land." (Italics ours.)

These are not the premises in hand.

Testing the question now before the court by the language used in that case we observe that the greatest "violation of fundamental principles is (here) suggested." Under the amendment to the Oregon constitution, the legislative department is *not* operating "by the orderly and well-settled methods prescribed by the fundamental law." "*The exercise of governmental powers immediately by the people themselves*" *is here not recognized as impracticable.* Under the initiative amendment "each man's power" does *not* tell "in the enactment of laws"; "the regular action of popular power" is *not* "taking place" and ascertained in accordance with "legal and authentic modes," and the plaintiff in error claims that in this case it "*is* being otherwise dealt with than in accordance to the laws of the land."

There remains for consideration the case of *Taylor vs. Beckham*, 178 U. S., 548.

The action was in *quo warranto* for usurpation of office.

After an adverse decision by the Supreme Court of Kentucky the petitioners brought the cause to this court on writ of error.

The contention was that an election contest in which the petitioners were the contestants was decided by the general assembly of the State in violation of the contestants' constitutional rights. The contest was heard under a statute giving the general assembly jurisdiction over election contests. The constitutionality of the statute was not assailed. But it was claimed that the petitioners had been deprived by the general assembly of their right to office without due process of law, and that the action of the general assembly deprived the people of the State of a republican form of government and of their political liberty without due process of law. The majority of this court held that the petitioners were deprived of no property right by the adverse determination of the legislative assembly of their right to office; that "the decision of these contested elections did not deprive plaintiffs in error of any pre-existing right" and that the judgment of the Court of Appeals (of the State) in declining to go behind the decision of the tribunal vested by the State constitution and laws with the alternate determination of the right to these offices denied no right secured by the 14th amendment." And refusing to interfere on the claim that the determination of the legislative assembly violated the guarantee of a republican form of government, the majority of this court declined jurisdiction, pointing out that the constitutional and statutory agencies of the State of Kentucky had acted in the manner provided by the constitution and statutes of the State. No claim was there made as in this case *that the constitution or statutes in themselves violated the Federal Constitution*, or that they rendered a valid exercise of governmental power impossible.

Leeper vs. Texas, 139 U. S., 462, cited at page 6 of the brief for the defendant in error, presented a question similar to that before the court in the case of *In re* Duncan, and the

decision was rested largely on the decision in the latter case. Chief Justice Fuller speaking for this court said:

> "We find nothing special, partial or arbitrary or in violation of fundamental principles in the criminal laws of the State of Texas involved."

And the court affirmed the judgment.

No one of these decisions touches the question whether State laws affecting the life, liberty or property of citizens of the United States, and enacted in violation of the basic principles of a republican form of government, may be enforced without the right of recourse to the national courts. In all of them, as an examination discloses, the issues involved were questions of political fact.

II.

The courts have never held that a cause was not justiciable because it involved an interpretation of article IV, section 4, but have in proper cases construed the language of that clause.

In all the cases, both those cited by defendant in error, and those by us referred to, in which the validity of a statute or constitutional provision was drawn in question on the ground of a violation of the form of a republican form of government, *the courts exercised jurisdiction and passed on the question.* All of the authorities cited by counsel at pages 30-31 under paragraph II of their brief, are in conflict with their argument that this court has no jurisdiction over the question even when confined to the narrow limits within which counsel restrict it. We contend and endeavor to show that the rights of the plaintiff in error under the fourteenth amendment are violated by the tax attempted to be levied by the measure in question. We further urged the unconstitutionality of the pretended tax by reason of the

fact that various provisions of the Federal Constitution were violated in the method of its enactment. Counsel assails this court's jurisdiction to interpret one of these provisions, to wit, that guaranteeing a republican form of government. But in the cases cited by the defendant in error the courts *did* consider the meaning of the words "a republican form of government" and passed upon the very question over which it is urged they had no jurisdiction.

In *Chisholm vs. Georgia*, 2 Dall., 419, this court gave the definition already mentioned.

In the case of *In re Duncan*, 139 U. S., 449, the court gave the definition quoted by us at page 25 of our brief.

In *Hopkins vs. Duluth*, 81 Minn., 189, the Supreme Court of Minnesota examined into the meaning of the phrase and held that the submission of *local charters* to popular vote was not inconsistent with a republican form of government, nor the referendum on any matter involving a change of government. But nowhere was there an intimation that the court had not the power to review the question.

In re Pfahler, 150 Cal., 71, and in *People vs. Sours*, 31 Colo., 369, the courts held that direct legislation by the people in municipal affairs in the one case and a constitutional provision for municipal home rule in the other, are not inconsistent with the republican form of government which the States are required to maintain. In neither opinion did the court deny its power to interpret the language of article IV, section 4, of the Federal Constitution.

In the three cases from the Supreme Court of Oregon, including the one at bar, the contentions that the initiative amendment to the Oregon constitution was invalid were not admitted; the constitutional amendment here assailed was held to be republican in form; but the jurisdiction of the court over the question was exercised and not denied.

In the *Kadderly* case, 44 Or., 118, the decision was rested largely on the ground that the governor's veto power pre-

served some measure of representation in legislation, the court saying that "unless, therefore, he has a right to veto any act submitted to him, except such as the legislature may specially refer to the people, one of the safeguards against hasty or ill-advised legislation which is everywhere regarded as essential is removed." But in *State vs. Kline*, 93 Pacific, 236, it was held that "the Chief Executive of the State is powerless either to approve or repudiate a measure passed in this manner;" and when we pointed out to the State court in this case that the measure here involved had not been submitted to the executive for approval, and that under the initiative amendment the governor's veto power did not extend to enactments by the people, the court, though unable to adhere to the premises on which its views were based, adhered to its conclusion. And, in passing, we note that what was said in the Kadderly case about the governor's veto power, quoted by defendant in error at pages 35 and 36 of its brief, was recalled by the court, on the authority of *State vs. Kline* (*supra*), in the opinion written in this case.

The Supreme Court of Colorado has in several cases reviewed the question whether the provision in the Federal Constitution guaranteeing a Federal form of government is violated by an amendment to the State constitution which withdraws from the control of State agencies any given portion of the State. It was held in *People vs. Sours*, 31 Colo., 369, that the amendment to the State Constitution merely "secured to the people of Denver absolute freedom from interference in matters of local concern;" and such a provision was held not repugnant to the Federal Constitution or to article IV, section 4, thereof. It was decided in *People vs. Johnson*, 38 Colo., 76; 86 Pac., 233, that the amendment conferred no powers of legislation upon the city and county of Denver in State affairs, and that the contrary construction would violate the requirement of the Constitution of the United States that a republican form of gov-

ıent be maintained. (*Elder vs. Colorado*, 86 Pac., 250, decided on the authority of *People vs. Johnson*, taken his court on writ of error. This court dismissed the writ rror on the ground that the interpretation given by the e court to the State constitution sustained the claim of lidity of the amendment under the provisions of article section 4, of the Federal Constitution. *Elder vs. Colo-o*, 204 U. S., 85.)

n the Johnson case the court said:

> "The question is: Can the people of the State, by constitutional amendment set apart any portion of the State and vest the citizens thereof with power to legislate upon matters other than those purely local and strictly municipal in their character? In the Sours case this court has said that this could not be done, for the reason that such act would be subversive of a republican form of government, repugnant to the Constitution of the United States, and violative of the compact existing between the State and Federal Government. * * * To concede the right to legislate upon such matters in the slightest particular must be to concede the right to legislate on all matters," etc., etc.

It is apparent that in the cases involving the question, e Supreme Court of Colorado has not hesitated to exercise s jurisdiction and to decide what is, and what is not, con-stent with a republican form of government.

In still more marked contradiction of the view of the de-ndant in error as to the jurisdiction of this court, is the uotation from the decision in *Minor vs. Happersett*, 21 Wall., 32 (brief of defendant in error, pp. 30, 32). Though it urged by the defendant in error that the question whether ıe Oregon amendment violates a republican form of gov-rnment is a political one, and that the interpretation of rticle IV of section 4 of the Federal constitution, is for ongress and the President, we find that in *Minor vs. Hap-ersett* this court was called upon to "ascertain what was

intended" by the phrase "republican form of government." And, as pointed out in our opening brief (page 93), the court, finding that it was compelled to look beyond the Constitution to determine the meaning of the phrase, found in the governments existing at the time of the adoption of the Constitution "unmistakable evidence of what was republican in form within the meaning of that term as employed in the Constitution." There was here no question about the jurisdiction of this court, but an important exercise of its power to interpret the Federal Constitution. And in other cases where occasion has arisen this court has for itself examined the Federal Constitution to determine the meaning of the language in article IV, section 4.

Thus in *Forsyth vs. Hammond*, 166 U. S., 519, the courts of Indiana having sustained their jurisdiction over a determination of a petition to enlarge territorial boundaries of a municipal corporation, Mr. Justice Brewer, in rendering the judgment of this court sustaining the holding of the State courts, said:

> "There is nothing in the Federal Constitution to prevent the people of a State from giving, if they see fit, full jurisdiction over such matters to the courts and taking it away from the legislature. The preservation of legislative control in such matters is not one of the essential elements of a republican form of government which under section 4 of article IV of the Constitution the United States are bound to guarantee to every State in this Union."

It was not questioned here that this court could not test the validity of the decree of the State courts by interpreting the language of this clause of the Constitution. There was no denial of the jurisdiction and duty of this court to determine the "essential elements of a republican form of government."

See also *South Carolina vs. U. S.*, 199 U. S., 437, 454.

In *Kies vs. Lowrey,* 199 U. S., 167, a State statute provided for the creation of a new school district. It was urged that this was an interference with the right of local government which would not be denied without violating the constitutional provision for a republican form of government.

Mr. Justice McKenna, speaking for the court, said:

> "The action of the legislature is compatible with a republican form of government,"

though the applicability of article IV, section 4, to the case was questioned. But no intimation is found in the opinion that this court had no power to pass on the validity of the State statute under this section of the Federal Constitution, or to determine the meaning of the clause, or to decide what is and what is not "compatible with a republican form of government."

In the case at bar also the meaning of the provisions of article IV, section 4, is brought into question, together with numerous other clauses of the Constitution. It is submitted that this court cannot refuse to interpret the Federal Constitution or any clause thereof in any cause where such interpretation is essential to the determination of a right asserted by a litigant properly before the court. The meaning of the Federal Constitution will determine whether plaintiff in error is entitled to the relief here sought; whether the judgment rendered in the State courts enforces due process of law. Only this court can construe the clauses of the Federal Constitution upon which the decision of this controversy depends, and we submit that this court cannot refuse so to do.

The right to a republican form of government is a substantial right. Like the franchise to vote, it is a political right. But this has always been held to be within the protection of the courts.

In *Capen vs. Foster,* 12 Pick., 485, 489, Chief Justice Shaw declared that the Constitution clearly conferred upon

And the eminent statesman to whom we referred in our opening brief summed up this proposition in the following pertinent words:

> "Any question arising in a legal proceeding as to the *meaning and application* of this fundamental law (the Federal Constitution) will evidently be settled by the courts of law. Every court is equally bound to pronounce and competent to pronounce on such questions, a State court no less than a Federal court; but as all the more important questions are carried by appeal to the Supreme Federal Court, it is practically that court whose opinion determines them."
>
> 1 Bryce Am. Com., p. 365. (Italics ours.)

See also

Consolidated Gas Co. vs. Willcox, 212 U. S., 19, 40.

And in the case of *Cohens vs. Virginia* (*supra*) the Chief Justice again said:

> "It is most true, that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction, if it should. The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the Constitution. We cannot pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur, which we would gladly avoid; but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously to perform our duty. In doing this, on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the Constitution and laws of the United States. We find no exception to this grant, and we cannot insert one."

It was pointed out in the argument of that case that there were many infractions of the Constitution possible which would yet not be within the reach of the arm of this court; that, therefore, the court was not the sole interpreter of the Constitution. The Chief Justice answered that contention as follows:

> "This may be very true; but by no means justifies the inference drawn from it. The article does not extend the judicial power to every violation of the Constitution which may possibly take place, but to 'a case in law or equity,' in which a right, under such law, is asserted in a court of justice. If the question cannot be brought into a court, then there is no case in law or equity, and no jurisdiction is given by the words of the article. But if, in any controversy depending in a court, the cause should depend on the validity of such a law, that would be a case arising under the Constitution, to which the judicial power of the United States would extend."

III.

The action of Congress in receiving Senators and Representatives from Oregon and its approval of a constitution containing the initiative as providing a republican form of government does not control this court in the construction of the language of the Oregon constitution, or in passing upon the validity of any provision of or amendment to that constitution.

It is asserted in the brief for the defendant in error that so long as the Executive does not object, and while Congress admits to its membership the representatives of a State, the government of that State is thereby recognized as constitutional and as republican in form; that this has been and is being done in the case of Oklahoma and in the case of Oregon, and that it is a determination of the question binding upon this court. Then, assuming a contrary disposition on

the part of the Congress and the President, how would the political departments nullify such "legislation" as this? Would it be by manifesto of the President? Would Congress eject Senators and Representatives from the National legislature because of the adoption of an invalid amendment to a State constitution? And if the Senators and Representatives of the offending State were thus ejected, would the State be out of the Union? Is not every State perpetually bound to its membership in the Union? How else is obedience to the law or protection against the enforcement of invalid legislation secured in our Government than by the courts?

Defendant in error points out at page 12 of its brief that "it is not a decision upon one clause of the Constitution, but the whole instrument is examined and considered and the plan or scheme of government there outlined adjudged to be republican or unrepublican in character. That is as far as Congress attempts to go, &c."

The preamble of the President's message declaring Oklahoma a State is quoted as containing a recital that the constitution and government of the proposed State of Oklahoma "are republican in form." It is said that the admission by Congress of Oklahoma on these terms is a finding that the government is republican in form. Does any one contend that this recital by Congress or by the President, or by both, deprives this court of its jurisdiction to determine whether one or more clauses or provisions of a proposed constitution conflict with the Federal Constitution? Is it argued that the validity under the Federal Constitution of an amendment to the constitution of a State already in the Union is beyond inquiry or is beyond examination by this court merely because the amendment contains a provision similar to that of a constitution of a State approved by Congress? Is this court deprived of power to determine whether the Oregon amendment conflicts with the Federal Constitution because provisions similar to that amendment are found in con-

stitutions with which new States have been admitted to the Union? We think not.

In the case of *Gunn vs. Barry*, 12 Wall., 610, the Georgia constitution of 1868 provided for homesteads against which judgments for debts were not enforcible. It was held by the State court that this provision and the provisions of the State statute of October 3, 1869, enforcing the constitution applied to judgments rendered before the adoption of the constitution of 1868. The claim that the constitutional provision impaired the obligation of contracts was met by the answer that Congress had approved the State constitution. Disposing of this contention, Mr. Justice Swayne said:

> "Though her constitution was sanctioned by Congress this provision can in no sense be considered an act of that body. The sanction was only permissive as part of the process of her rehabilitation and involved nothing affirmative or negative beyond that event. If it were express and unequivocal the result would be the same. Congress cannot by authorization or ratification give the slightest effect to a State law or Constitution in conflict with the Constitution of the United States. That instrument is above and beyond the power of Congress and the States and is alike obligatory upon both."

It is apparent that what Congress cannot do by affirmative legislation, it could not accomplish by mere inaction.

The Homestead cases, 22 Gratt., 266, involved the validity of a provision of the constitution of Virginia adopted in 1868, exempting homesteads from execution and levy for antecedent debts. Congress having approved the constitution, Virginia's representatives were readmitted to Congress under the reconstruction acts. It was urged that the approval of the new constitution by Congress bound the courts. To this the court said:

> "It is true that, under the act of March 1867, the approval of the constitution by Congress was required before the State should be entitled to representation.

> The effect of withholding its approval would have been to continue the military government to which the State was then subjected. But when the constitution was approved, the senators and representatives elected under it admitted, it then became the organic law of this State, binding upon all the citizens of the State and all departments of the State government organized under it, except *so far as any* of its provisions may be in conflict with the Constitution of the United States (p. 285).
>
> "* * * It is further insisted by the counsel for the appellants, that the present constitution of Virginia, having no validity under the reconstruction laws, until approved by Congress, must be regarded as a law of Congress; and that therefore, the inhibition of the Constitution of the United States which is upon the *States*, and not upon Congress, has no application" (p. 284). (Italics ours.)

Demonstrating the fallacy of this argument the court proceeded:

> "But suppose the constitution of Virginia could, in any view, be considered an act of Congress, then I deny that Congress can violate the Constitution of the United States any more than a State. That Constitution is the 'supreme law of the land,' paramount in its obligation and binding force upon all departments of government, State and Federal; upon the national legislature as well as the State legislatures; upon the judicial and executive, as well as upon the legislative departments of both Federal and State governments; upon the whole people, governing and restraining their acts and conduct, whether exercised by their representatives in the National Congress, or by their representatives in State conventions and State legislatures. It is to each and all the supreme law of the land.
>
> "It would be a monstrous fallacy to hold, either that Congress can authorize a State to do that which the constitution of the United States prohibits a State from doing, or that Congress may itself supersede the National Constitution."

Now it is not apparent that if the congressional approval of a State constitution is binding "except so far as any of its provisions may be in conflict with the Constitution of the United States," it is also binding only so far as the provisions of the State constitution do not conflict with the requirements of the only form of government permissible under the Federal Constitution—to wit, the republican form. This court is not asked to declare that not to be a State which Congress and the President have recognized as such; nor to deny the right of senators and congressmen to sit whom Congress has admitted. Such is not as counsel seem to think the issue here. Our contention merely demands of the court that it pronounce that article, clause, provision or phrase of the State law invalid which in its judgment violates one or more provisions of the Federal Constitution.

And here it may be observed that no peculiar restrictions limit the judicial authority when exercised with reference to congressional acts of admission. They are legislative acts as much subject to review for a proper determination of their conformity to the Federal Constitution as are any other enactments. Recently this court considered the powers of Congress in this regard in *Coyle vs. Smith*, 31 Sup. Ct. Rep., 688, decided May 29, 1911. It was there held that certain restrictions in the enabling act admitting Oklahoma to the Union were unconstitutional because void for want of power. The power of Congress to admit new States, and its function of seeing that the forms of government were not changed to anti-republican forms were not denied; but it was held that the power was nevertheless a limited power; its exercise was in that case reviewed by this court; and it was held that the limitations upon the power had been transgressed. The proposition that the power was a political one was not denied; but this fact did not oust the jurisdiction of this court to determine whether it had been constitutionally exercised.

Mr. Jusice Lurton, speaking for the court, said:

> "But what is this power? It is not to admit political organizations which are less or greater or dif-

> ferent in dignity or power from those political entities which constitute the Union. It is strongly put by counsel as the power to admit States."

And what authority, we ask, determines whether Congress has in point of fact attempted "to admit political organizations which *are less or greater or different* in dignity or power," if it be not this court? Manifestly to make that determination this court must itself examine the political organizations admitted to the Union and claimed to be different or less or greater. And just as this court declined to be bound by the legislative finding that the enabling act admitting Oklahoma to the Union conformed to the Federal Constitution and gave the new State an equal standing in the Union, so here we invoke the court's jurisdiction to review the validity of provisions of the Oregon constitution, despite the facts that the President and Congress have, by implication, accepted these provisions as conforming to the Federal Constitution and as not differing from a republican form of government.

The prerogatives of Congress, which defendant in error speaks of in the first paragraph of its reply brief, were not involved in the Oklahoma case, far less in the case at bar. In the former case this court was not called upon "to decide whether it (Oklahoma) should become a member of the Union" (brief for defendant in error, p. 18). Nor in this case is the court required to determine whether Oregon may remain in the Union. The question of repugnancy of a single provision of the enabling act to the Federal Constitution was at issue in the former case, and in this case it is the validity of a single provision in the Oregon constitution that is involved.

But it is said "If the courts take jurisdiction of these questions, then we have a decision upon a political question, decided by the political power, re-examined by the judicial and perhaps overthrown. One branch of the Government becomes arrayed against another and revolution or

ebellion is imminent" (brief of defendant in error, p. 12). The argument is strangely reminiscent of General Jackson's famous defiance, "John Marshall has pronounced his udgment. Let him enforce it if he can." Such is not yet he spirit or temper of the people of this country. Nor is he suggestion one which has received the approval of this ourt. It was made and answered in the case of *McPherson s. Blacher*, 146 U. S., 1. The court there recognized that he United States Government consists of three departments, he legislative, executive, and judicial. All are sworn to uphold the Federal Constitution. Each department, when alled upon, must exercise the functions ascribed to it.

The case involved the validity of an act of the Michigan egislature regulating the choice of presidential electors.

> "It is argued," said the court, "that the subject-matter of the controversy is not of judicial cognizance because it is said that all questions connected with the election of a presidential elector are political in their nature; that the court has no power finally to dispose of them, and that its decision would be subject to review by political officers and agencies as the State board of canvassers, the legislature in joint convention, and the governor; or, finally, the Congress.
>
> "But the judicial power of the United States extends to all cases in law or equity arising under the Constitution and the laws of the United States, and this is a case so arising, since the validity of a State law was drawn in question as repugnant to such Constitution and laws and its validity was sustained" (p. 23).

And again:

> "The question of the validity of this act as presented to us by this record is a judicial question *and we cannot decline the exercise of our jurisdiction upon the inadmissible suggestion that action might be taken by political agencies in disregard of the judgment of the highest tribunal of the State, as revised by our own*" (p. 24). (Italics ours.)

The courts are the final interpreters of the Constitution, and as they pass upon the constitutional powers of the legislatures and executives of the Nation and of the States, so must they, when called upon, exercise their functions and determine the validity of the acts of the people of a State, so far as they affect the constitutional rights of the citizens or the powers of the National Government; for, as was said by Chief Justice Chase:

> "* * * the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government."
>
> *Texas vs. White*, 7 Wall., at page 725.

More recently this court, through Mr. Justice Harlan, spoke on this subject as follows:

> "The idea that any legislature, State or Federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, Federal and State, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land."
>
> Smyth *vs.* Ames, 169 U. S., 527.

IV.

The court has jurisdiction because the Oregon amendment providing for the initiative and the "measure" in question deny due process of law and the equal protection of the law.

In the opening brief (pp. 35-45) plaintiff in error invoked the jurisdiction of the court against an infraction of its right to due process of law and the protection of equal laws.

We submitted that the "measure" in question, neither in the manner of its enforcement nor in its enactment, constitutes due process of law; nor can it be the basis of due process; and neither the conclusions of the State court nor of Congress could bind this court in determining whether plaintiff in error has been accorded its rights under the Fourteenth Amendment.

In *Davidson vs. New Orleans*, 96 U. S., 97, Mr. Justice Miller, speaking for the court, said:

> "Can a State make anything due process of law which by its own legislation it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail or has no application where the invasion of private rights is effected under forms of State legislation."

And Mr. Justice Peckham observed in *Allgeyer vs. Louisiana*, 165 U. S., 578, that an unconstitutional statute does not become due process of law. The question here raised was decided in a case extremely similar to the one at bar, *Southwestern Tel. & Tel. Co. vs. City of Dallas*, decided by the Supreme Court of Texas, February 15, 1911, and found in 134 S. W., 321.

The question arose upon the validity of an alleged ordinance initiated by the voters of the city of Dallas and adopted by their vote. The power was exercised under a provision of the charter of the city that—

> "Any proposed ordinance may be submitted to the board of commissioners by a petition signed by registered electors of the city equal in number to the percentages hereinafter required."

Answering the contention of the municipal counsel thaat the language used intended to include ordinances on any subject of legislation, the court said:

> "We are of opinion that the language 'any proposed ordinance' means that an ordinance upon any subject to which the initiatory method is applicable may be presented in the manner prescribed to the commissioners. It does not mean that all ordinances upon any subject of legislation mentioned in the charter may be enacted in that manner."

And calling attention to the provisions of the charter by which the board of commissioners who constitute the governing body of the city of Dallas are empowered to determine, fix and regulate charges after a fair hearing on the reasonableness of rates, the court said:

> "In the exercise of the power to regulate and fix rates, etc., there must be a body who can hear evidence and decide upon the reasonableness or unreasonableness of the rate or regulation, and if that cannot be done by the initiative—the popular vote—then, the authority cannot be exercised in that manner. Can it be necessary to offer argument to show to any man that such hearing as the law provides could not be had in a campaign before the electorate of the city? It is too manifest for controversy.
>
> "Can it be supposed that a legislature would require a board of commissioners to secure a fair hearing to the party to be affected, and yet would permit some unknown party to draft an ordinance, specifying rates and regulations, without the knowledge of any facts, and submit such ordinance to the popular vote where there can neither be an investigation nor any character of ascertainment of the facts? That would be to place upon the language of the charter an unreasonable construction. If the charter provided for the

submission of such issues to the voters at large, its validity would, at least, be questionable,"

iting *Tel. Co. vs. Los Angeles*, 211 U. S., 280, and holding hat a fair hearing was not had and could not be had in the doption of the ordinance by popular vote. The court held he ordinance void, and the grounds of that decision apply ith far greater force to a measure levying a rate upon the ross earnings of a public service corporation and acted upon olely by the votes of the electorate of an entire State.

The power to impose taxes has in our Government always been vested exclusively in the legislative department. It is a political axiom that the taxing power must be exercised by the legislative arm of the Government or by its authority.

See our opening brief, pages 37 *et seq.*

"The power of taxation," said Chief Justice Waite, "is legislative, and cannot be exercised otherwise than under the authority of the legislature." *Meriwether vs. Garrett*, 102 U. S., 472, 501.

And in *Heine vs. The Levee Commissioners of New Orleans*, 19 Wall., 655, Mr. Justice Miller, delivering the opinion of the court, said:

> "The power we are here asked to exercise is the very delicate one of taxation. This power belongs in this country to the legislative sovereignty, State and National. * * * The power must be derived from the legislature of the State."

And see

Munday vs. Rahway, 43 N. J. L., 346.
Cooley, Taxation, 32, 34.

In *Spencer vs. Merchant*, 125 U. S., 345, 355, this court said:

> "The power to tax belongs exclusively to the legislative branch of the Government."

And, quoting the language of Chief Justice Chase, Mr. Justice Gray continued:

> "The power to tax may be exercised oppressively upon persons; but the responsibility of the legislature is not to the court but to the people by whom its members are elected."

We claimed in our opening brief that government by the people directly is government without representation. This is practically conceded by the defendant in error. It is not claimed that the initiative does not subvert the representative principle in government. If this be so, then taxation by direct vote of the people is taxation without representation. Whether the concrete right to notice and a hearing before the legislature must be accorded to every citizen before a taxing statute is passed (*Williams vs. Eggleston*, 170 U. S., 304), the act of the legislature is in all cases the act of the representatives of the people who are taxed. The right of petition and hearing before the legislature is an inherent attribute of citizenship (*U. S. vs. Cruikshank*, 92 U. S., 542), and through its exercise every person taxed can demand a hearing. In any event taxation by the ballot of the majority violates each and all of these conditions. It is taxation without a possible hearing, without a possible right of petition, and without representation, and for these reasons it is not due process of law.

It has been observed that the guarantee of equal protection of the law is a guarantee of the protection of equal laws.

Southern Railway Co. vs. Greene, 216 U. S., 412.
Yick Wo vs. Hopkins, 118 U. S., 369.

We pointed out in our opening brief that in Oregon no class of persons other than corporations engaged in six different kinds of business are taxed by the initiative method. The following language from *Yick Wo vs. Hopkins* appropriately describes the situation in the case at bar:

"In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

The unconstitutionality of the acts of a State are equally within the jurisdiction of the courts, whether they be the acts of the legislative or executive department or of the people themselves, adopting their constitutions or amending them.

Cohens vs. Virginia, 6 Wheat., 415.
Dodge vs. Woolsey, 18 How., 332.
Cummings vs. Missouri, 4 Wall., 277.
Cooley, Const. Lim., 7th ed., p. 62.

In *Koehler vs. Hill* (*supra*), the court said:

"It is well that the powers of the people and their relations to organized society should be understood. *No heresy has ever been taught in this country so*

fraught with evil as the doctrine that the people have a constitutional right to disregard the constitution, and that they can set themselves above the instrumentalities appointed by the constitution for the administration of law. It tends directly to the encouragement of revolution and anarchy. It is incumbent upon all who influence and mould public opinion to repudiate and discountenance so dangerous a doctrine before it bears fruits destructive of republican institutions. It will be well if the people come to understand the difference between natural and constitutional freedom, before license becomes destructive of liberty" * * * (15 N. W., 615-616).

"We have approached and discussed this grave question with a full appreciation of the responsibilities which it involves, and we have given to its consideration the earnest attention which its importance demands. We have sought to maintain the supremacy of the Constitution at whatever hazard. *It is for the protection of minorities that constitutions are framed. Sometimes constitutions must be interposed for the protection of majorities even against themselves.* Constitutions are adopted in times of public repose, when sober reason holds her citadel, and are designed to check the surging passions in times of popular excitement. But if courts could be coerced by popular majorities into a disregard of their provisions, constitutions would become mere 'ropes of sand,' and there would be an end of social security and of constitutional freedom" (p. 630). (Italics ours.)

In the *Homestead cases* (*supra*) the Supreme Court of Virginia said:

"And where the legislative will, *or the popular will declared in the solemn form of a constitution, is in contravention of the supreme law of the land, the judicial department must uphold that law,* and unflinchingly guard it as inviolable. This principle and this duty grow out of no superiority, which the judicial department of the Government claims over

the legislative, but is inherent in the very nature and form of our system of government" (p. 280). * * * (Italics ours.)

"It has been well settled by the adjudications of the Supreme Court of the United States, that a State can no more impair the obligation of a contract by adopting a constitution than by passing a law. In the eye of the constitutional inhibitions they are substantially the same thing" (p. 282).

V.

Authorities cited by Defendant in Error as to the Meaning of the Phrase "A Republican Form of Government."

We find on page 23 of the reply to our brief a number of citations made to support the claim that a government in which the power of direct legislation is vested in the people is republican in form.

The proposition that direct government in local affairs is constitutional under the Federal Constitution (*People vs. Sours,* 31 Colo., 369, *Ex Parte Pfahler,* 150 Cal., 71; *Hopkins vs. Duluth,* 81 Minn., 189), was discussed by us and the principle not controverted (opening brief, pp. 102, 177).

And in *Kies vs. Lowrey,* 199 U. S., 233, as we have already pointed out, Mr. Justice McKenna, speaking for the court, expressed a doubt as to whether the provisions of article IV, section 4, could be invoked in cases involving the "creation of, or the powers or rights of property of the subordinate municipalities of the State."

The Oregon cases cited by defendant in error, including the opinion in this case, were all referred to by us. Though not in accord as to some of the material reasons for the conclusions reached, the Oregon Supreme Court and the Supreme Court of Oklahoma have upheld the validity of direct legislation (*Ex Parte Wagner,* 21 Okl., 33, 36). The

opinion in the latter case contains little analysis of the question.

Kring vs. Missouri, 107 U. S., 221, cited by counsel for defendant in error has no apparent relevancy, we respectfully submit, to the case at bar. It was there held that a change in the criminal procedure of the Missouri courts was an *ex post facto* law so far as the petitioner in the case was concerned, and its application to his case, unconstitutional.

Hopkins vs. Duluth, 81 Minn., 189, was an election contest.

Chisholm vs. Georgia, 2 Dallas, 419, has, we also submit, no bearing on this case. It is apparently cited for the statement by Judge Wilson, found at page 25 of the brief of defendant in error.

We do not oppose the proposition advanced by learned counsel that a republican government is one in which "the supreme power resides in the body of the people." But that is far from saying that the people themselves shall directly exercise this power; and in our opening brief we endeavored to point out the difference (pp. 13-27, 75, 144). It is the difference between a republic and a democracy. And the definition by Justice Wilson, so much relied upon by the defendant in error, would be equally appropriate when applied to a pure democracy.

The other authorities cited by defendant in error are discussed by us herein, or were referred to in our opening brief, except the observations of Mr. Oberholtzer, with which we are constrained to disagree.

The cases cited at pages 30-31 of the brief for defendant in error are all found in the list at page 23, already referred to.

It is suggested in the remarks of C. E. S. Wood, Esq., found as an addendum at pages 54 *et seq.* of the brief for defendant in error, that Hamilton was the author of article IV, section 4, of the Constitution (p. 58), and "battled for

its adoption" (p. 60). The further statement that the clause was "adopted by Hamilton in his plan from Randolph's draft first submitted," is, we believe, historically more accurate.

In point of fact, it was offered to the convention on May 28, 1787, as the eleventh of Randolph's resolutions. Charles Pinckney's plan, submitted the same day, did not contain the provision. (*Elliott's Debates*, vol. V, pp. 128-132.) On June 18, 1787, Hamilton, "who had hitherto been silent on the business before the convention," in a celebrated speech presented a sketch containing eleven propositions, of which this clause was not one (*Elliott's Debates*, vol. V, pp. 198-205); though his completed plan handed to Madison at a later date, shortly before the adjournment of the convention, was, according to Hannis Taylor, read to the convention and contained the clause as article IX, section 8. (Hannis Taylor's "Origin and Growth of the American Constitution," Appendix, p. 568.)

But we find in none of these speeches or writings of Hamilton evidence that he was "battling" for the revolutionary principles of direct legislation. No one detested more than he the form of government which this court is now asked to sanction; no one distinguished more clearly than Hamilton between the republican and democratic form of government or was more thoroughly alive to the destructive forces of a government the administration of which is attempted directly by the multitude. It can serve no purpose to again refer to those writings which contain Hamilton's views. We endeavored to collate them in our opening brief.

VI.

Conclusion.

We respectfully submit that in our opening brief we offered abundant evidence of the meaning of the phrase "republican form of government" as understood by the

framers of the Constitution and by the people of the States when they adopted it as their fundamental law. As remarked by Mr. Justice Brewer in *South Carolina vs. U. S.*, 199 U. S., p. 448:

> "The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now."

Recognizing that its elasticity yet permits the Constitution to embrace "in its grasp all new conditions which are within the scope of the powers in terms conferred," and that "while the powers granted do not change they apply from generation to generation to all things to which they are in their nature applicable," the learned justice concluded that "this in no manner abridges the fact of its changeless nature and meaning." Defendant in error urges that no question of expediency can be weighed in this case. With no less earnestness we urge the same argument. And the language adopted by Mr. Justice Brewer in the same opinion (p. 449), with reference to the Federal Constitution here seems apposite:

> "As long as it continues to exist in its present form it speaks not only in the same words but with the same meaning and intent with which it spoke when it came from the hands of its framers and was voted on and approved by the people of the United States. Any other rule of construction would abrogate the judicial character of this court and make it the mere reflex of the popular opinion or passion of the day."

In conclusion, we submit that the validity or invalidity of direct legislation under our system of government and under the Federal Constitution, designed to perpetuate that system of government, must in the last instance be decided by this court. We assert that direct legislation by the people in State or National affairs violates the principle of representation, the cardinal principle of the form of government

adopted in this country, and impairs the component parts, if indeed it does not destroy the most essential part of the structure upon which rests the Federal Government. We confidently contend that the Federal Constitution expressly and by implication prohibits such a form of government either in the States or in the Nation. In the language of Chief Justice Marshall, in the famous case above referred to, *Cohens vs. Virginia:*

> "If such be the Constitution, it is the duty of the court to bow with respectful submission to its provisions. If such be not the Constitution, it is equally the duty of the court to say so; and to perform that task which the American people have assigned to the judicial department."

It is respectfully submitted that the judgment of the Supreme Court of the State of Oregon should be reversed.

E. S. PILLSBURY,
OSCAR SUTRO,
Attorneys for Plaintiff in Error.

CAREY & KERR,
PILLSBURY, MADISON & SUTRO,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908

No. 8222

PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY,
Plaintiff in Error,

AGAINST

THE STATE OF OREGON,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

STATEMENT OF CASE.

An action at law was brought in the Circuit Court of the State of Oregon for Multnomah County by the State of Oregon, defendant in error, plaintiff therein, against Pacific States Telephone & Telegraph Company, plaintiff in error, defendant therein, to recover the sum of $10,450.68, alleged to be due and owing the State of Oregon from the corporation, under the pro-

visions of what is known as the Gross Earnings Tax Law, the same being a law enacted by the people of the State of Oregon by the initiative method June 4th, 1906, and promulgated by the Governor of the State of Oregon by proclamation, dated June 25, 1906, from which date it has been in full force and effect, and is published as Chapter 1 of the Session Laws of 1907, and set forth in full in the answer, pages 5, 6 and 7 of the Transcript of Record.

Complaint, page 2 of record.

The answer of the defendant (plaintiff in error herein) admits that it is a corporation, as alleged, and that it furnished the report referred to in the complaint, and that the volume of its business within the State of Oregon, June 25, 1906, to January 1st, 1907, was as stated therein, and that 2 per cent thereof is the amount demanded by plaintiff of defendant, together with 10 per cent of said amount for failure to pay the same, and that defendant has not paid said amount, or any part thereof, or said additional sum of 10 per cent of said amount, or any part thereof.

Then the defendant (plaintiff in error herein) further answering, sets up two further defenses, in effect, as follows:

First. That said initiative act, to-wit: Chapter 1 of the Oregon Laws for 1907, is violative of Sections 2, 3, 4 and 8 of Article I, Sections 3 and 4 of Article IV, and Articles V and VI of the Constitution of the United States, and Article

XIV of amendments thereto, alleging that said sections of the federal constitution imply that the several states of the Union shall create and maintain representative legislative assemblies, and that the amendment to the Constitution of the State of Oregon, permitting direct legislation by the people and the said law enacted thereunder, destroys representative government and violates said sections in that respect; and that Section 4 of Article IV of the Constitution of the United States guarantees that each state shall maintain a republican form of government, and alleges that said initiative measure and said amendment to the Oregon Constitution under which it was enacted are inconsistent with and violative of a republican form of government, and, therefore, null and void.

Second. Defendant, plaintiff in error, alleges that it has paid taxes on all its property under the general revenue and taxation laws of the State of Oregon and under the corporation license tax law of the state, and, therefore, the act imposing the tax under which this action is brought is null and void, being in effect double taxation, and that it contravenes the equal and uniform principle of the Oregon Constitution relative to assessment and taxation.

A third defense was also set forth in said answer, to the effect that said initiative act imposing the tax in question was void for the reason that it undertakes to tax the business done by defendant as a telegraph company with the offi-

cials of the government of the United States, under and pursuant to the provisions of an Act of Congress, approved July 24, 1866, but on motion of defendant, plaintiff in error herein, that defense was stricken from the answer, the same being paragraphs 24, 25, 26 and 27 thereof, set forth on pages 14 and 15 of the record herein, and hence was not considered in the state courts, and the same is not involved in this appeal. (Transcript of Record, pages 3 to 16, inclusive).

Defendant in error (plaintiff in the state court) filed a demurrer to the further answer of defendant, as a whole, for the reason that the new matter set forth therein does not constitute a defense to the cause of action set forth in the complaint, nor to any part thereof, and, separately, to counts numbered 1 to 23, both inclusive, and 24 to 29, both inclusive, and to each paragraph of said answer separately, for the same reason. (Transcript of Record, page 23).

Said demurrer was sustained by the State Supreme Court on the 9th day of March, 1908, and judgment given in favor of the State of Oregon, from which judgment and decree of the Supreme Court of the State of Oregon, this writ of error was sued out, which judgment of the state court is found on pages 35, 36 and 37 of the record herein.

The amendment to Section 1 of Article IV of the Oregon Constitution is made a part of the answer, and is set forth on page 4 of the Transcript of Record.

The act making effective the provisions of said amendment was attached to and made a part of the answer, marked "Exhibit A," and is set forth in full on pages 17 to 22, both inclusive, of the Transcript of Record.

The initiative act imposing the tax involved in this cause, also set forth in the answer, is printed on pages 5, 6 and 7 of the Transcript of Record.

A copy of the official ballot used in the election of June 4, 1906, at which the initiative act was voted, is attached to the Transcript of Record herein, between pages 22 and 23, and was "Exhibit B" of said answer.

The writ of error to this court raises three questions:

First. Is the authority to determine whether a state government is republican in form, a political or a judicial power?

Second. Whether the initiative method of enacting laws, as adopted by the State of Oregon, contravenes any of the provisions of the federal constitution.

Third. Whether the tax imposed by said Chapter 1 of the Session Laws of Oregon for 1907 is violative of the equal and uniform principle of the Oregon Constitution relative to assessment and taxation.

We will discuss the propositions in the order named.

I.

The power to determine whether a State has a republican form of government is vested in Con-

gress. Hence, is a political rather than a judicial question.

Luther *v.* Borden *et al.*, 7 How. (U. S.) 1-42;
Texas *v.* White, 7 Wall. (U. S.) 700, 730;
Taylor *v.* Beckman, 178 U. S. 548, 578;
Hopkins *v.* City of Duluth, 81 Minn. 189 (83 N. W. 536);
Article by W. A. Coutts, Vol. VI, No. 4, p. 304, Michigan Law Review;
In *re* Duncan, 139 U. S. 449.

And if judicial the courts of the United States will follow the decision of the State courts, where the State court has passed upon the question.

Luther *v.* Borden, 48 U. S. 1-40;
Leeper *v.* State of Texas, 139 U. S. 462-467.

As far as we have been able to discover, the Federal authorities, including the Supreme Court, have treated this as a political question.

In Luther *v.* Borden *et al.*, 7 How. (U. S.) 1, 42, the court says:

"Moreover, the Constitution of the United States, as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a State, has treated the subject as political in its nature, and placed the power in the hands of that department.

"The fourth section of the fourth article of the Constitution of the United States provides that the United States shall guarantee to every State in the Union a republican form of govern-

ment, and shall protect each of them against invasion, and on the application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence."

Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantees to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal.

In Texas *v.* White, 7 Wall. (U. S.) 700, 730, the court say:

"But the power to carry into effect the clause of guarantee is primarily a legislative power, and resides in Congress."

Then the court quotes with approval from Luther *v.* Borden, *supra*, as follows:

"Under the fourth article of the constitution, it rests with Congress to decide what government is the established one in a State. For, as the United States guarantees to each State a republican form of government, Congress must necessarily decide what government is established in the State, be-

fore it can determine *whether it is republican or not.*"

And in Taylor and Marshall *v.* Beckham, 178 U. S. 548, this court, upon this proposition, affirms the doctrine announced in Luther *v.* Borden and Texas *v.* White, *supra*, the court using the following language: (Page 578)

"It was long ago settled that the enforcement of this guarantee belonged to the political department. Luther *v.* Borden, 7 How. 1. In that case it was held that the question, which of the two opposing governments of Rhode Island, namely, the charter government or the government established by a voluntary convention, was the legitimate one, was a question for the determination of the political department; and when that department had decided, the courts were bound to take notice of the decision and follow it; and also that as the Supreme Court of Rhode Island holding constitutional authority not in dispute, had decided the point, the well-settled rule applied that the courts of the United States adopt and follow the decisions of the State courts on questions which concern merely the Constitution and laws of the State."

The duties of the courts are in no sense legislative, and they have no authority to make laws, but are simply confined to their construction and enforcement. The Constitution is the fundamental law of the land and the rule by which the courts are to be guided in determining whether a law has been enacted in the manner the people have decreed shall be observed by the law-making powers. If the Supreme Court of a State attempts to

say whether the fundamental law of the State is a just law or whether it establishes the form of State government guaranteed by the Federal Constitution, it assumes a control over the making of constitutions—something that was never intended by such constitutions. The courts thus assume an authority not given in the fundamental laws and therefore not vested in them. The courts are purely creatures of the statutes and the constitutions, and derive all of their powers therefrom, and if we have a form of government which is unrepublican in character and, therefore, not such a form of government as is guaranteed by the Constitution of the United States and our Constitution, therefore, void and ineffective, then we have no courts capable of pronouncing any judgment whatever, because they are not created under any valid law. It cannot be claimed that the courts have the authority to provide any manner or take any steps towards the restoration of a subverted and overthrown State government. That authority is vested in the executive and legislative branches of the United States government, and if they have the power of restoration, the power also of deciding when a State government is subverted or overthrown, must rest in the same place.

In Vol. 6, Michigan Law Review, page 304, Mr. W. A. Coults, in an able article, entitled, *"Is a Provision for the Initiative and Referendum Inconsistent with the Constitution of the United*

States," upon the question under discussion, among other things, at pages 309 and 310, says:

"Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guaranty to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts. So, too, as relates to the clause in the above mentioned article of the Constitution, providing for cases of domestic violence. It rested with Congress, too, to determine upon the means proper to be adopted to fulfill this guaranty. They might, if they had deemed it advisable to do so, have placed it in the power of a court to decide when a contingency had happened which required the Federal government to interfere. But Congress thought otherwise, and, no doubt, wisely; and, by the Act of February 28, 1795, provided that, 'in case of an insurrection in any State against

the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such State or of the executive (when the legislature cannot be convened) to call forth such number of the militia of any other State or States as may be applied for, as he may judge sufficient to suppress such insurrection.'"

Also Mr. Cooley, in his work on Constitutional limitations, treats the question of whether a State Constitution is republican in form as political. He says, page 59, 7 Ed.; 42 6 Ed.:

"There are always in these cases questions of policy as well as of constitutional law to be determined by the Congress before admission becomes a matter of right,—whether the Constitution formed is republican; whether suitable and proper State boundaries have been fixed upon; whether the population is sufficient; whether the proper qualifications for the exercise of the elective franchise have been agreed to; whether any inveterate evil exists in the Territory which is now subject to control, but which might be perpetuated under a State government,—these and the like questions, in which the whole country is interested, cannot be finally solved by the people of the Territory for themselves, but the final decision must rest with Congress, and the judgment must be favorable before admission can be claimed or expected."

This question does not lose its political complexion because it has arisen since the admission of Oregon into the Union of States. If the courts take jurisdiction of these questions, then we have a decision upon a political question, decided by the

political power, re-examined by the judicial and perhaps overthrown. One branch of the government becomes arrayed against another, and revolution or rebellion is imminent. Oklahoma was admitted as a State with the power reserved to the people to initiate laws the same as reserved in the Oregon Constitution. Is this power to be permitted to one State and denied to another on high constitutional grounds, and under the same Federal guaranty that each State shall have the same kind of a government, the political power of the general government holding it to be republican in form, the judiciary that it is not. In a government where the final power rests with the people, if there is any doubt as to whether a matter should be determined by the political or the judicial branch, it should be resolved in favor of the political.

It is not a decision upon one clause of the Constitution, but the whole instrument is examined and considered, and the plan or scheme of government there outlined adjudged to be republican, or anti-republican, in character. That is as far as Congress attempts to go, and in the case at bar, the original instrument having been amended, the power to re-examine the same as to whether the republican form of the State government has been changed to a form anti-republican still remains vested in Congress, where it was lodged by the Federal Constitution. If not, we are unable to conceive by what authority Congress has been divested of that power. We freely admit that the

courts have the authority to say whether an amendment to the Constitution of a State has been enacted in the manner provided in the instrument for amending the same, but that is as far as the jurisdiction of the courts extend. As soon as they decide that the amendment has been properly enacted, it becomes a part of the Constitution, and if the amendment is of such a character that it changes the form of government, making it contravene the Federal Constitution, as to its political form, Congress has the power to so declare, and direct the State to make its Constitution conform to the form of government guaranteed by the Federal Constitution, and in such case will act whenever the matter is called to its attention, and if necessary, command all the forces of the general government, including the military, to enforce its decree.

We also call the attention of the court to the fact that the State of Oklahoma was recently admitted into the Union with the initiative and referendum principles reserved to the people. Sections 2 and 3 of Article 5 of the Oklahoma Constitution provide:

"Sec. 2. The first power reserved by the people is the initiative, and eight per centum of the legal voters shall have the right to propose any legislative measure, and 15 per centum of the legal voters shall have the right to propose amendments to the Constitution by petition, and every such petition shall include the full text of the measuse so proposed. The second power is the referendum, and it may be ordered (except as to

laws necessary to the immediate preservation of the public peace, health, or safety) either by petition signed by 5 per centum of the legal voters or by the legislature as other bills are enacted. The ratio and per centum of legal voters hereinbefore stated shall be based upon the whole number of votes cast at the last general election for the state office receiving the highest number of votes at such election.

"Sec. 3. Referendum petitions shall be filed with the Secretary of State not more than ninety days after the final adjournment of the session of the Legislature which passed the bill on which the referendum is demanded. The veto power of the Governor shall not extend to measures voted on by the people. All elections on measures referred to people of the State shall be had at the next election held throughout the State, except when the legislature or the governor shall order a special election for the express purpose of making such reference. Any measure referred to the people by the referendum shall take effect and be in force when it shall have been approved by a majority of the votes cast in such election. Any measure referred to the people by the referendum shall take effect and be in force when it shall have been approved by a majority of the votes cast thereon and not otherwise.

"The style of bills shall be, 'Be it enacted by the people of the State of Oklahoma.'

"Petitions and orders for the initiative and the referendum shall be filed with the Secretary of State and addressed to the Governor of the State, who shall submit the same to the people. The legislature shall make suitable provisions for the carrying into effect the provisions of this article."

And the President's message declaring Oklahoma a State contains the following:

"Whereas, it appears the said Constitution and government of the proposed State of Oklahoma are republican in form, etc."

The case at bar being an attack on the fundamental law of the State and said law being the instrument which creates the court and defines its powers, can it be possible that the court has jurisdiction to pass upon the political complexion of the Constitution itself, unless it is so expressed in the instrument? There is no such thing as inherent power in the courts. They can exercise no jurisdiction or power except that which is derived from the Constitution creating the court, whether State or Federal. Section 4 of Article 4 of the United States Constitution guarantees to every State a republican form of government and therefore makes it the duty of the general government to determine when the State has such a form. It is conceded by all constitutional writers that when a new State applies for admission, Congress is the department to determine whether the proposed State Constitution is in the required form and if not, it is rejected and must be changed to meet the requirements of Congress. No provision is made, nor has it ever been claimed that the Supreme Court of the United States should decide the question or that it has power so to do. Cooley, before cited, says, p. 243:

"If in one department was vested the whole power of the government, it might be essential

for the people in the instrument delegating this complete authority to make careful and particular exception of all those cases which it was intended to exclude from its cognizance, for without such exception the government might do whatever the people themselves, when met in their sovereign capacity would have power to do. But when only the legislative power is delegated to one department and the judicial to another, it is not important that the one should be expressly forbidden to try causes, or the other to make laws. The assumption of judicial power by the legislature in such a case is unconstitutional, because although not expressly forbidden, it is nevertheless inconsistent with the provisions which have conferred upon another department the power the legislature is seeking to exercise. And for similar reasons a legislative act which should undertake to make a judge the arbiter of his own controversies would be void, because, though in form a provision for the exercise of judicial power, in substance it would be the creation of an arbitrary and irresponsible authority, neither legislative, executive, nor judicial, and wholly unknown to constitutional government."

Plaintiff in error cited in the State court the homestead cases, 22 Gratt. 266, involving the validity of a provision of the Constitution of Virginia, adopted in 1866, exempting homesteads from execution and levy for antecedent debts, in support of the contention that the courts have jurisdiction in the case at bar.

These cases were in no sense political. They did not involve the question as to whether the form of the Virginia government was republican,

but only a principle of property rights, and the court held that Section 1 of Article XI of the Constitution of Virginia, exempting homesteads to the amount of $2,000 was violative of Section 10of Article VIII of the Constitution of the United States, providing that no State shall pass any law impairing the obligation of contracts, and the court held the Constitution of that State could not exempt homesteads to the amount of $2,000, or in any other amount, when the exemption would enable a debtor to avoid a debt contracted prior to the adoption of the homestead law, and to that extent the said law would be hostile to the Federal Constitution; and held also that the court had jurisdiction to try that question. The jurisdiction vested in a court to determine whether a constitution denies some personal or property right guaranteed in the Federal Constitution does not imply that the court can decide whether the State government is in form republican, monarchical or aristocratic.

It has, also, been held in this court that a State could not pass *expost facto* laws. (Kring *v.* Missouri, 107 U. S. 221). But we have been unable to find a case where the court has taken cognizance of purely political questions, like the one involved in this case, and undertaken to decide whether a State government is republican or anti-republican in form.

"Each State must judge for itself how the powers of government shall be apportioned in order to their proper exercise; what protection shall be

thrown around the person or property of the citizen; and to what extent private rights shall be required to yield to the general good, and the courts of the State, still more the courts of the Union, would be precluded from inquiring into the justice of their action or questioning its validity, because of any supposed conflict with fundamental rules of right or of government, unless they should be able to show collision at some point between the instrument thus formed and that paramount law which constitutes, in regard to the subject it covers, the fundamental rule of action throughout the whole United States." Cooley, Const. Lim., 6 Ed., page 45.

While a court may decide whether an amendment of a constitution has been adopted in the prescribed manner, and whether it denies any constitutional right, either as to property or person, it would, we submit, be considered an invasion of the prerogatives of Congress should the court undertake to decide whether the constitution of a new State seeking admission is republican in form, and to decide whether it should become a member of the Union.

II.

If the court decides to retain jurisdiction, the principal question is whether the initiative and referendum amendment to Section 1 of Article IV of the Constitution of the State of Oregon contravenes the provisions of Section 4 of Article IV of the Constitution of the United States, or any other section or provision thereof, as being unrepubli-

can in form or in any other manner, and the main contention of plaintiff in error in the State court was that said amendment is void for the reason that the Constitution of the United States guarantees to every State a republican form of government, and that such a form of government is wholly representative in character, and all legislation must be enacted by legislators elected or chosen by the people; hence, said amendment to the Oregon Constitution, permitting the people of the State to initiate and enact a State law or regulation (except through the medium of the State legislature) and all laws enacted by virtue thereof under initiative methods are void, and, therefore, the law imposing the tax in question, being so enacted, cannot stand.

This question is fundamental in character, affecting the authority of the State to enact its laws and regulate its internal affairs; in any manner agreeable to its citizens, and should not be decided by technical rules, but should be approached and disposed of on broad grounds and liberal views.

A State Constitution should not be held to contravene the Federal Constitution unless the general scope and plan of government provided in the former is opposed to the general scope and plan of government required by the latter, to be maintained by the State.

The argument of the plaintiff in error in the State court appeared to be based on the theory that changing the State Constitution so as to

permit of direct legislation is changing the form of government from a "republican form"; hence a State Constitution, permitting such method of legislation, conflicts with the Federal Constitution, and cannot stand. Therefore, it is necessary first to determine what, in the meaning of the term as used in the Federal Constitution constitutes a

REPUBLICAN FORM OF GOVERNMENT:

Section 4 of Article IV of the Federal Constitution, claimed to be violated by the people of Oregon by the adoption of the amendment to Section 1 of Article IV of their Constitution June 2, 1902, reads as follows:

"Section 4. The United States shall guarantee to every State in the Union a republican form of government and shall protect each of them against invasion, and on application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence."

And the said amendment to the Constitution of the State of Oregon claimed to be repugnant thereto is in the following language:

"Section 1 of Article IV of the Constitution of the State of Oregon shall be, and hereby is, amended to read as follows:

"Section 1. The legislative authority of the State shall be vested in a legislative assembly, consisting of a senate and house of representatives, but the people reserve to themselves power to propose laws and amendments to the Constitu-

tion and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly. The first power reserved by the people is the initiative, and not more than eight per cent of the legal voters shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the Secretary of State not less than four months before the election at which they are to be voted upon. The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health, or safety), either by the petition signed by five per cent of the legal voters, or by the legislative assembly, as other bills are enacted. Referendum petitions shall be filed with the Secretary of State not more than ninety days after the final adjournment of the session of the legislative assembly which passed the bill on which the referendum is demanded. The veto power of the Governor shall not extend to measures referred to the people. All elections on measures referred to the people of the State shall be had at the biennial regular general elections, except when the legislative assembly shall order a special election. Any measure referred to the people shall take effect and become the law when it is approved by a majority of the votes cast thereon, and not otherwise. The style of all bills shall be: 'Be it enacted by the people of the State of Oregon.' This section shall not be construed to deprive any member of the legislative assembly of the right to introduce any measure. The whole number of votes cast for Justice of the Supreme

Court at the regular election last preceding the filing of any petition for the initiative or for the referendum shall be the basis on which the number of legal voters necessary to sign such petition shall be counted. Petitions and orders for the initiative and for the referendum shall be filed with the Secretary of State, and in submitting the same to the people he, and all other officers, shall be guided by the general laws and the act submitting this amendment, until legislation shall be especially provided therefor."

The amendment does not attempt to do away with the legislative assembly, but leaves it intact with full power to enact or repeal any and all laws and perform every obligation imposed upon it by the Federal Constitution and laws. It merely reserves the right to propose laws and to enact or reject the same at the polls, independent of the legislative assembly, including amendments to the Constitution. We are unable to understand wherein the reservation of that power and the power to demand that any act passed by the legislature not necessary for the immediate preservation of the public peace, health or safety be referred to the people for their approval or rejection, is unrepublican in character or contravenes any provision of the Federal Constitution.

We submit it is essentially republican in form as guaranteed in the Federal Constitution, construed in the light of the following authorities:

Cooley, Const. Lim. (7 Ed.) 59, 6 Ed. 42 and 45;

Federalist, Hamilton Ed., Paper 39, p. 301;

Federalist, Hamilton Ed., Paper 43, p. 342.
Oberholtzer on the Referendum in America, Chap. 45, pp. 368 and 369;
2 Vol. Story, Const. (5 Ed.) Secs. 1815 to 1819, both inclusive;
Elliott's Debates, Vol. 1, p. 406;
Elliott's Debates, Vol. 5, p. 160;
Vol. XV Writings of Thomas Jefferson, p. 17 (See Vol. XI, Federal Ed., p. 529);
Chisholm *v.* Georgia, 2 Dallas (U. S.) 419, 457;
In *re* Duncan, 139 U. S. 449, 461;
Luther *v.* Borden, 7 How. (U. S.) 42;
Minor *v.* Happersett, 21 Wall. (U. S.) 162, 175;
Taylor v. Beckham, 178 U. S. 548, 478; 20 Sup. Court Rep. (U. S.) 890, 901;
Hopkins *v.* Duluth, 81 Minn. 189; 83 N. W. 536;
People *ex rel. v.* Sours, 31 Colo. 369, 383;
In *re* Andrew Pfahler, 150 Cal. 71, 77, 78;
Ex parte Wagner, 21 Okl. 33, 36;
Kadderly *v.* Portland, 44 Or. 118, 144; 74 Pac. 710;
Oregon *v.* Pac. States T. & T. Co., 53 Or. 162; 99 Pac. 427;
Straw *v.* Harris, 54 Or. 424, 431;
Kring *v.* Missouri, 107 U. S. 221.

The members of the Federal convention considered a "republican form of government" to be

a government which derived all its powers from the great body of the people, and this view is also maintained by many other eminent statesmen.

Mr. James Madison, a member of the constitutional convention, in The Federalist (Hamilton Ed.), Paper No. 39, page 301, says:

"What, then, are the distinctive characters of the republican form? Were an answer to this question to be sought, not by recurring to principles, but in the application of the term by political writers, to the constitutions of different states, no satisfactory one would ever be found."

Mr. Madison evidently considered the essential part of a republican form of government to be a government in which all the sovereign powers rest in the great body of the people, regardless of the manner in which those powers are exercised by the people, whether directly or by representatives or other agencies.

In Paper 43, at page 342, same book, the same writer, in discussing the guaranty to every State in the Union of a republican form of government, says:

"It may possibly be asked, what need there could be of such a precaution, and whether it may not become a pretext for alterations in the State governments, without the concurrence of the States themselves. These questions admit of ready answers. If the interposition of the general government should not be needed, the provision for such an event will be a harmless superfluity only in the Constitution. But who can say, what experiments may be produced by

the caprice of particular States, by the ambition of enterprising leaders, or by the intrigues and influence of foreign powers? To the second question it may be answered, that if the general government should interpose by virtue of this constitutional authority, it will be of course bound to pursue the authority. But the authority extends no farther than to a *guaranty* of a republican form of government, which supposes a pre-existing government of the form which is to be guaranteed. As long therefore, as the existing republican forms are continued by the States, they are guaranteed by the Federal Constitution. Whenever the States may choose to substitute other republican forms, they have a right to do so, and to claim the federal guaranty for the latter. *The only restriction imposed upon them is, that they shall not exchange republican for anti-republican constitutions; a restriction which, it is presumed, will hardly be considered as a grievance.*"

It is evident from the above excerpts that the writer understood the word "republican," as used in Section 4 of Article IV of the Federal Constitution, to mean and refer to popular government.

In the case of Chisholm *v.* Georgia, 2 Dallas (U. S.) 419, 457, Mr. Justice Wilson, who was one of the delegates from Pennsylvania to the Constitutional Convention, said:

"As a citizen, I know the government of that State (Ga.) to be republican, *and my short definition of such a government is one constructed on this principle; that the supreme power resides in the body of the people.*"

This opinion was announced in 1793, only a few years after the adoption of the Federal Constitution, and may be considered as a contemporaneous definition of the phrase "Republican form of government."

At the time the Federal Constitution was made, and when the above case was decided, the Constitution of Georgia contained the following reservation of the initiative power to amend the State Constitution:

"Article LXIII. No alteration shall be made in this Constitution without petitions from a majority of the counties, and the petitions from each county to be signed by a majority of voters in each county within this State, at which time the assembly shall order a convention to be called for that purpose, specifying the alterations to be made, according to the petitions preferred to the assembly by the majority of the counties as aforesaid."

Also, in the Federal convention, Mr. Wilson said:

"He wished for vigor in the government, but he wished that vigorous authority to flow immediately from the legitimate source of all authority. The government ought to possess, not only, first, the *force*, but, second, the *mind* or *sense*, of the people at large. The legislature ought to be most exact transcript of the whole society. *Representation is made necessary only because it is impossible for the people to act collectively.*" Vol. 5 Elliott's Debates, p. 160.

It thus appears that his understanding was that representation was not necessary to a republican

form of government, but necessary *"only because it is impossible for the people to act collectively."*

John Randolph, also a member of the convention, used the word "republican," as opposed to monarchy or monarchical form of government.

He was for the present amendment (the same being the final draft) "because a republican government must be the basis of our national union; and no State in it ought to have it in their power to change its government into a monarchy. 1 Elliott's Debates, 406.

The framers of the Federal Constitution knew that in at least four of the confederated States, to-wit: Massachusetts, Connecticut, New Hampshire, and Rhode Island, there was a system of local governments known distinctively as "New England Towns." That they were on an average six miles square, and the people residing in those limits were organized by law into bodies politic and were clothed with power to legislate upon various matters within their boundaries, such as roads and highways, support of the poor, election of their own officers, etc., and that the inhabitants assembled at least once a year to pass their local laws and regulations, and yet the members of the Federal convention apparently did not consider these local governments, no matter how vigorous and flourishing, as unrepublican in form or inimical to republican institutions.

Mr. Thomas Jefferson, in his letter to Mr. John Taylor, of date May 28, 1816, in Vol. XV, Jefferson's Writings (Library Edition), at page

19, defines the term "republic" as follows: (Federal Ed. 529)

"Were I to assign to this term a precise and definite idea, I would say, purely and simply, it means a government by its citizens in mass, acting directly and personally, according to rules established by the majority; and that every other government is more or less republican, in proportion as it has in its composition more or less of this ingredient of the direct action of the citizens. Such a government is evidently restrained to very narrow limits of space and population. I doubt if it would be practicable beyond the extent of a New England township. The first shade from this pure element, which, like that of pure vital air, cannot sustain life of itself, would be where the powers of the government, being divided, should be exercised each by representatives chosen either *pro hac vice*, or for such short terms as should render secure the duty of expressing the will of their constituents. This I should consider as the nearest approach to a pure republic, which is practicable on a large scale of country or population * * * On this view of the import of the term *republic*, instead of saying, as has been said, 'that it may mean anything or nothing,' we may say with truth and meaning, that governments are more or less republican, as they have more or less of the element of popular election and control in their composition; and believing, as I do, that the mass of the citizens is the safest depository of their own rights and, especially, that the evils flowing from the duperies of the people, are less injurious than those from the egoism of their agents, I am a friend to the composition of government which has in it the most of this ingredient."

Story on the Constitution, 2 Vol., 5th Ed., Chapter XLI, discusses the guaranty of republican government, apparently in full harmony with the definition of republic for which we contend, and he refers to the Federalist in Sec. 1815 of said chapter, saying:

"The Federalist has spoken with so much force and propriety upon this subject, that it supersedes all further reasoning. 'In a confederacy,' says that work, 'founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations. The more intimate the nature of such a union may be, the greater interest have the members in the political institutions of each other, and the greater right to insist that the forms of government under which the compact was entered into should be *substantially* maintained."

The Oregon method of invoking the initiative in legislation is a method of avoiding the difficulty, the framers of the Federal Constitution urged as the main objection to the people legislating directly, as voiced by Mr. Wilson, *supra*:

"Representation is made necessary only because it is impossible for the people to act collectively."

The laws under consideration provide a way for the people to act collectively and at the same time with knowledge. Each voter must be furnished with the full text of each law at least six weeks prior to the election at which he is required to vote upon the same. The people do not meet

en masse nor vote *viva voce*, but alone in single booths, and under the solemn sanction of the Australian ballot. This also avoids the danger of a law being enacted through the sudden heat of passion or prejudice, engendered at the time of meeting by the persuasive eloquence of some great orator. In fact, it leaves all of the ancient objections to popular government with absolutely no support in sound reason. As we have seen, it acts as a check upon vicious legislation by the legislative assembly, and at the same time provides a means, whereby good measures denied by the legislature can be carried into effect, and the will of the people respected and made effective, in practice as well as in theory. The rights of no man, whether pertaining to person or property, are jeopardized by the Oregon system, nor is any constitutional safeguard imperiled or destroyed.

Both the Federal and State courts have uniformly held that the initiative method of enacting laws was not repugnant to the provisions of Section 4 of Article IV of the Federal Constitution, either directly or by necessary inference.

Chrisholm *v.* Georgia, 2 Dallas (U. S.) 419, 457;

In *re* Duncan, 139 U. S. 449, 461;

Minor *v.* Happersett, 21 Wall. (U. S.) 162, 175;

Hopkins *v.* City of Duluth, 81 Minn. 189; 83 N. W. 536;

People *ex rel. v.* Sours, 31 Colo. 369, 383, 386; 37 Pac. Rep. 167, 168, 172;

In *re* Andrew Pfahler, 150 Cal. 71, 77-78;
Kadderly *v.* Portland, 44 Or. 118; 74 Pac. 710;
Oregon *v.* Pac. States T. & T. Co., 53 Or. 162; 99 Pac. 427;
Straw *v.* Harris, 54 Or. 424, 431.

The case of Chisholm *v.* Georgia, before cited, 2 Dallas (U. S.) 419, at page 457, is the first judicial definition of republican government we have been able to find. In that case, Mr. Justice Wilson, who, as we have before stated, was a member of the Federal convention, and to whom Mr. Justice Harlan has referred as the most learned member thereof, in discussing the question of whether a state may be sued in the Supreme Court by an individual citizen of another State, or whether the State on account of being a sovereign power, could not be so sued, said:

"In another sense, according to some writers, (a) every State, which governs itself, without any dependence on another power, is a sovereign State. Whether, with regard to her own citizens, this is the case of the State of Georgia; whether those citizens have done, as the individuals of England are said, by their late instructors to have done, surrendered the supreme power to the State government, and reserved nothing to themselves; or whether, like the people of other States, and of the United States, the citizens of Georgia have reserved the supreme power in their own hands; and on that supreme power, have made the State dependent, instead of being sovereign; these are questions to which, as a judge in

this case, I can neither know nor suggest the proper answers; though, as a citizen of the Union, I know, and am interested to know, that the most satisfactory answers can be given. As a citizen, I know the government of that State to be republican; and my short definition of such a government is—one constructed on this principle, that the supreme power resides in the body of the people."

In Minor *v.* Happersett, 21 Wall. 162, at pages 175, 176, the court having under consideration the question whether a provision in the Constitution of the State of Missouri, which confined the right of voting to male citizens of the United States, was violative of the fourteenth amendment of the Federal Constitution, said:

"It is true that the United States guarantees to every State a republican form of government. It is also true that no State can pass a bill of attainder, and that no person can be deprived of life, liberty, or property without due process of law. All these several provisions of the Constitution must be construed in connection with the other parts of the instrument, and in the light of the surrounding circumstances.

"The guaranty is of a republican form of government. No particular government is designated as republican, neither is the exact form to be guaranteed, in any manner especially designated. Here, as in other parts of the instrument, we are compelled to resort elsewhere to ascertain what was intended.

"The guaranty necessarily implies a duty on the part of the States themselves to provide such a government. All the States had governments

when the Constitution was adopted. In all the people participated to some extent, through their representatives elected in the manner specially provided. These governments the Constitution did not change. They were accepted precisely as they were, and it is, therefore, to be presumed that they were such as it was the duty of the States to provide. Thus we have unmistakable evidence of what was republican in form, within the meaning of that term as employed in the Constitution." Opinion by Chief Justice Waite.

A part of the "unmistakable evidence" the court had before it, when that decision was made, must have been knowledge of the New England system of local governments, hereinbefore mentioned.

In Hopkins *v.* City of Duluth, 81 Minn. 189 (83 N. W. 536), the court, having under consideration the question whether an amendment to the State Constitution providing for the submission of new city charters or amendments thereto to the voters of the localities interested for approval or rejection, violated Section 4 of Article IV of the Federal Constitution, at pages 191 and 192, says:

"The purpose of this guaranty was to protect a union founded upon republican principles against aristocratic and monarchical innovations. Cooley, Const. Lim., 28. At the close of the Civil War this guaranty was made the subject of much discussion in Congress, partaking of a political character, in the efforts towards reconstruction. It is a Federal guaranty, to be exercised by Federal, rather than State, authority. The con-

ditions and necessities of its exercise are as yet quite abstract and theoretical, and it is not easy to see how its application here is of any particular consequence. It will be admitted, however, that this State cannot supplant its republican form of government by "aristocratic and monarchical innovations" upon principles inherent in the nature of the government, but it may change its Constitution in any way consistent with its own fundamental law; and we are unable to see the force of the suggestion that the amendment of 1898 is not republican in form as well as spirit. It is true that, by the submission of charters and amendments to municipalities in the manner provided for by the amendment, a change is effected; but it is a change that by every historical sanction, from the earliest times, is republican in form and essence. The Federal as well as the State government is representative in character, although the people do not directly vote upon the adoption of the laws by which they are governed. Yet it cannot be said that, if they were able to do so, a provision to effectuate that purpose would not be republican. We apprehend that a little reflection must satisfy any one that the advantage of providing local self government by the voters directly interested, through a 'referendum' is abstractly as well as concretely more republican than through representatives of the people in the legislature, many of whom are not at all interested in the affairs of the given locality."

"The suggestion that the constitutional amendment authorizes a submission of a charter and amendments thereto through the instrumentalities of a commission has no weight, so long as the final adoption depends upon the exercise of the

elective franchise. The test of republican or democratic government is the will of the people, expressed in majorities, under the proper forms of law. Every proposal for a change of government must of necessity be submitted, either directly or indirectly, through a designated origin, whether it be upon the motion of one or of more persons, upon the instance of the individual citizen or a number; but so long as the ultimatum of decision is left to the will of the people at the ballot box, it is essentially republican, and the theoretical distinction urged by the learned counsel for the contestee practically amounts to no more than this, that the change provided for is new and radical. It may turn out that the amendment is beneficial or otherwise, yet its tendency is clearly republican, and must be upheld by the court."

In People *v.* Sours, 31 Colo. 369, 384, and 385, the court holds that an amendment, consolidating a city and county government into one, and providing that the people of the city and county shall adopt a charter and to adopt any measure for their government, not inimical to the said amendment, is not obnoxious to the provisions of the enabling act, which requires the Constitution to be republican in form, and not repugnant to the Constitution of the United States.

In Kadderly *v.* Portland, 44 Or. 118, at page 146, the court says:

"The veto power of the Governor is not abridged in any way, except as to such laws as the legislature may refer to the people. The provision of the amendment that 'the veto power of the Governor shall not extend to measures re-

ferred to the people' must necessarily be confined to the measures which the legislature may refer, and cannot apply to acts upon which the referendum may be invoked by petition. The Governor is required, under the Constitution, to exercise his veto power, if at all, within five days after the act shall have been presented to him, unless the general adjournment of the legislature shall prevent its return within that time, in which case he shall exercise his right within five days after the adjournment. He must necessarily act, therefore, before the time expires within which a referendum by petition on any act of the legislature may be invoked and before it can be known whether it will be invoked or not. Unless, therefore, he has a right to veto any act submitted to him, except such as the legislature may specially refer to the people, one of the safeguards against hasty or ill-advised legislation which is every where regarded as essential is removed—a result manifestly not contemplated by the amendment."

And in the case at bar the State court cited with approval the opinion in Kadderly *v.* Portland, saying:

"Whether the initiative and referendum amendment to the Constitution is invalid, because repugnant to the provisions of the Constitution of the United States, was thoroughly argued to and considered by this court in Kadderly *v.* Portland, 44 Or. 118 (74 Pac. 710; 75 Pac. 222), and the views of the court as then and now entertained are indicated in the opinion filed in that case, and it is needless to re-state them at this time." Oregon *v.* Pacific States T. & T. Co., 53 Or. 162, 166.

The latest expression of the Oregon Supreme Court is found in Straw *v.* Harris, 54 Or. 424, 431, in which Mr. Justice King, delivering the opinion of the court, says:

"By the adoption of the initiative and referendum into our Constitution, the legislative department of the State is divided into two separate and distinct lawmaking bodies. There remains, however, as formerly, but one legislative department of the State. It operates, it is true, differently than before—one method by the enactment of laws directly, through that source of all legislative power, the people; and the other, as formerly, by their representatives — but the change thus wrought neither gives to nor takes from the legislative assembly the power to enact or repeal any law, except in such manner and to such extent as may therein be expressly stated. Nor do we understand that it was ever intended that it should do so. The powers thus reserved to the people merely took from the legislature the exclusive right to enact laws, at the same time leaving it a co-ordinate legislative body with them. This dual system of making and unmaking laws has become the settled policy of the State, and so recognized by decisions upon the subject. Kadderly *v.* Portland, 44 Or. 118 (74 Pac. 710; 75 Pac. 222); Oregon *v.* Pac. Sta. T. & T. Co., 53 Or. 162 (99 Pac. 427)."

And the United States Supreme Court, in *re* Duncan, 139 U. S., at page 461, says:

"By the Constitution, a republican form of government is guaranteed to every State in the Union, *and the distinguishing feature of that form is the right of the people to choose their own*

officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their governments, National and State, have been limited by written Constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities."

The foregoing definitions by some of the ablest statesmen who participated in revolutionary events, and the decisions of the Federal and State courts as far as we have been able to find expression upon the question, substantially agreeing that the essentials of a republic form of government are that it derives all of its powers either directly or indirectly from the people, and that *representation* is not necessary to constitute such government, should be considered as establishing the meaning of the phrase as used in Section 4 of Article IV of the Constitution of the United States.

We are unable to find a single expression of any member of that memorable convention, or of a court, holding the view that legislation by representatives only is an essential of a republican *form of government*, and submit that unanimity of opinion for more than a hundred years should be decisive.

The stability of government demands that the universally understood meaning of a fundamental law shall not be lightly set aside.

Also, the executive and legislative branches of the Federal government have held, in substance, that the reservation of the initiative and referendum powers by the people of a State is not violative of the Federal Constitution nor hostile to a republican form of government. Senators and representatives from States reserving those powers are seated in the Senate and House of Representatives without protest. When new States are admitted, the President and Congress pass upon the form of government presented by the proposed State, and decide whether the same is in harmony with the Constitution of the United States, and they have in several cases approved State Constitutions reserving the identical powers attacked in the case at bar, notably: Oklahoma and Arizona, and other States have changed their Constitutions to include those powers, to-wit: South Dakota, Utah, Colorado, Arkansas, Maine and Oregon, without objection from any Federal authority, and no question has ever been raised as to their representation in Congress.

Also the right of the people to instruct their representatives in Congress and in State legislatures, if it exists, is an admission or acknowledgment that the supreme power rests in the people, and we contend that such right does exist.

RIGHT TO INSTRUCT.

The right of the people to instruct their representatives in Congress and in State legislatures is preserved by the ninth and tenth amendments to the Constitution. Therefore, the representative system of government, which defendant admits is republican in form, *includes a final power in the people.* Said Articles IX and X read as follows:

"IX. *Rights Retained.* The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

"X. *Powers Reserved.* The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Section 26, Article I, Oregon Constitution, expressly recognizes the right of instruction, said section providing among other things as follows:

"No law shall be passed restraining any of the inhabitants of the State * * * from instructing their representatives," etc.

And Section 33 of Article I of the Oregon Constitution provides this enumeration of rights and privileges shall not be construed to impair or deny others retained by the people. This right to instruct has been frequently exercised from the formation of the government, and is recognized in the Constitutions of many of the States, including Maine, New Hampshire, Vermont, Massachusetts, Tennessee, Ohio, Indiana, Illinois, Michigan,

Arkansas, California, and Oregon, but whether it exists in States where not recognized in their Constitutions, seems to be a mooted question.

Cushing's Law and Practice of Legislative Assemblies has the following on the question of the right of instruction, Section 727:

"In this country, the right of instruction has been contended for on the one hand, independent of constitutional provision, and, on the other, has been denied to exist, even where it is expressly conferred, in any other sense, than as declaring the right of constituents to make known their views and wishes to their representatives. Both propositions are equally untenable. A right of instruction, to which the duty of obedience is not correlative, is entirely inconsistent with the Constitution and functions of an independent, sovereign legislative power; and it is equally impossible to suppose that the right of instruction is restricted, in those of the Constitutions in which it is declared, to signify a mere expression of opinion on the part of constituents, with which representatives are at liberty to comply or not at their pleasure. It may be stated, therefore, in regard to the right of instruction in this country, that it exists only in those States in which it is expressly reserved by constitutional provision; and that where it so exists, it is an absolute right, to be implicitly obeyed, when exercised, so far as it is authoritatively expressed."

Oregon having recognized and reserved this right to instruct, can exercise the same at will and can finally determine by what law she shall be governed, provided always that her laws and

Constitution do not contravene the Federal Constitution and laws of Congress. This right to instruct being reserved in the Constitution of the United States was not granted by the States to the Federal government, hence must be considered as a part of the rights reserved, carrying with it the admission that the form of government established by the colonies was such as to include and did include the principle that the final power rests with the people, and such was at the adoption of the said Constitution considered by the framers of that instrument to be republican in form.

Sovereignty is defined, Rapalje and Lawrence's Law Dictionary, as: "That power in a State to which none other is superior."

In Moore *v.* Emaw and Freemont *v.* Flower, 17 Cal. 199, sovereignty is defined, as a term used to express the supreme political authority of an independent State or Nation.

From the standpoint of sovereignty as above defined, the location of the different systems of government are classified as follows: Monarchical, Aristocratic, and Republican, and we submit it was in this sense that the Federal Constitution used the term republican. This is gathered from the Federalist, Elliot's Debates on the Adoption of the Constitution, and commentaries on this clause.

Federalist Letter, 43.

The methods by which the people's power is used in popular systems of government may be

classified as direct, representative, and mixed, a combination of the other two, which was the system in operation in this country in 1787; and it follows that this mixed form is a republican system of government, and that "republican form of government" and representative government are not synonymous terms. Each is part of a distinct and separate system of classification, and while from the standpoint of sovereignty all popular governments may be called republican, it was the mixed form of direct and representative, which was established by our revolutionary fathers and still exists. If the final power rests with the people, they can exercise that power in any form they deem best for themselves, provided the form is not anti-republican.

The classification of the different systems just mentioned may be illustrated as follows:

Forms of government from standpoint of sovereignty—
- Monarchial,
- Aristocratic,
- Republican.

Forms of popular (republican) government, from standpoint of use of people's power—
- Direct,
- Representative,
- Mixed (combination of the direct and representative).

It will be conceded, we doubt not, that in establishing a government, the will of the people is supreme. It is sovereign, and they may reserve

such powers to themselves and invest the government they establish with such powers and confer them upon such agents as they believe will be the most conducive to their own welfare, and all such powers must be exercised in the manner provided in the Constitution, but this does not prohibit the people from amending their Constitution, in the manner therein provided, and in the case at bar, the people amended their Constitution in accordance with the methods provided, and then legislated in pursuance of the amendment. Therefore, the doctrine that in a representative government the legislature cannot delegate to the people the power to make laws, does not apply. The only question is, does the amendment of the Oregon Constitution permitting of the initiative method of legislation contravene any provision, or provisions, of the Federal Constitution?

Appellant in error contends that "history does not furnish the definition of the phrase 'republican form of government,' as those words were used by the framers of the Constitution. *They distinguished the American from all other republics by the introduction of the principle of representation.*" If the principle of representation was engrafted on a republican system, for convenience, as claimed by appellant in error, it does not follow that the representative system is the only republican form of government. The introduction of the representative principle was the departure, and created what is designated as a "rep-

resentative republic." And it is laid down by numerous authorities that any republican form may be substituted for the form existing when the Constitution was adopted, and the guaranty of the Federal Constitution could be invoked in its support. The court says in Hopkins *v.* City of Duluth, 81 Minn. 189:

"The Federal, as well as the State, government is representative in character, and the people do not directly vote upon the adoption of the laws by which they are governed. *Yet it cannot be said that if they were able to do so, a provision to effectuate that purpose would not be republican.*" (Italics ours).

Mr. Madison's definition of a republican form of government is fully met and exemplified in the case at bar. He says, Federalist, 302, before cited, that a republican form of government is:

"A government which derives all of its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure for a limited period, or during good behavior."

In the case at bar all the powers of the State government are derived from the great body of the people and most of them directly, and the government is administered by persons holding office for a limited period.

Rapalje & Lawrence's Law Dictionary defines "republic" as: "A commonwealth; a form of government, the administration of which is open to all the citizens," and defines "republican government" as: "A government of and by the

people as distinguished from a monarchical or aristocratic government."

The Twentieth Century Encyclopaedia and Dictionary defines "republic": "A constitution in which the supreme power in the State is vested not in hereditary rulers, but in the citizens themselves according to the constitution of the nation; a republic may therefore vary from the proudest aristocracy to the most absolute democracy."

Encyclopaedia Americano (edition 1903-1904) defines "republic": "A word signifying a state in which the people are the source of power."

The contention of appellant in error, urged in the State court, that the powers of the initiative and referendum, reserved to the people, prevents the State from discharging the obligations imposed upon it, by the Federal Constitution and laws, is not well founded.

The two powers may be said to be inseparable, as the initiative sets in motion the power to enact a law, which must be referred to the people to approve or reject, and even when the people wish to demand that an act passed by the legislative assembly be referred to them for approval or rejection, they must first invoke the initiative, to-wit: must petition to have the act referred, but the petition has the force of a command and the officer to whom it is addressed has no discretion, but must obey.

Oberholtzer on the Referendum in America, in Chapter 45, discusses the relative relation of the two powers to each other. He says, on page 368:

"The initiative and the referendum, the initiative being mentioned logically first, have been introduced as inseparable parts of a whole into the legislative practice of South Dakota, Nebraska, California, Iowa, and the city of San Francisco, and they exist together in fact, if not in name, in nearly all the States of the Union."

And, again, on page 369:

"The referendum has been described as a condition precedent to the taking effect of a law; the initiative is a condition precedent to the referendum. The referendum, itself in the nature of a contingency, is made to depend upon a contingency, and that is the filing with representative local officials of a petition signed by a definite number of persons, asking that the citizens residing within a given district shall have the opportunity to say yea or nay on the proposition that it shall be governed by the terms of a certain local by-law which the State legislature has proposed."

Mr. Justice Bean says, in the Kadderly case, 44 Or. 145:

"Now, the initiative and referendum amendment does not abolish or destroy the republican form of government, or substitute another in its place. The representative character of the government still remains. The people have simply reserved to themselves a larger share of legislative power, but they have not overthrown the republican form of the government, or substituted another in its place. The government is still divided into the legislative, executive, and judicial departments, the duties of which are discharged by representatives selected by the people.

"8. Under this amendment, it is true, the

people may exercise a legislative power, and may, in effect, veto or defeat bills passed and approved by the legislature and the Governor; but the legislative and executive departments are not destroyed, nor are their powers or authority materially curtailed. Laws proposed and enacted by the people under the initiative clause of the amendment are subject to the same constitutional limitations as other statutes, and may be amended or repealed by the legislature at will."

The legislative assembly of Oregon, prior to said amendment to the Constitution of said State, could not pass a law which would authorize the election of United States Senator or Representative in any other manner than that provided by the Constitution of the United States, and the laws of Congress enacted relative thereto, and this amendment does not attempt so to do. It provides another mode for the people of Oregon to enact desired laws, but it does not in any particular presume to ignore any constitutional restrictions, either Federal or State, nor to disregard any law of Congress.

The allegation of legal conclusions in the bill of complaint (we are unable to view them in any other light) contained in paragraphs VIII to XXIII, both inclusive, are all based upon the assumed effect of said amendment to the Oregon Constitution, upon the ability of the State to discharge its obligations to the Federal government. Appellant in error assumes that it is impossible for the legislative assembly to enact the necessary laws for such purpose. But nothing of that

nature is expressed in the amendment nor must it be necessarily, or can it be logically inferred therefrom. It does not prohibit a legislative assembly nor deprive it of any of its powers. Therefore, the State can create and maintain representative legislative assemblies and the position that only a part of the voters of the State actually cast an affirmative vote upon laws and measures adopted by the people without the aid of the legislative assembly is equally void of merit. The people's representatives when assembler as lawmakers never, or very seldom, all agree upon any measure, and if a majority of each house is secured, the bill has received the solemn sanction of the legislature, and becomes a law when signed by the Governor. But it is urged by appellant in error that a majority of all the voters of the State do not always vote for the measure, but it becomes a law if a majority of all voting on the proposition are in favor. This, we admit, and contend, is strictly in accord with our form of government, State and Federal. In the election of members of the State legislature, it is seldom that a candidate receives a majority of all the votes of the State or of all votes cast, as there are usually more than two parties, each having a candidate, and a plurality must and does settle the question of the election, and in the legislative assembly a majority of plurality-elected members decides. But a majority of all votes cast for or against a measure always decides its adoption or rejection. There can only

be the two questions before the voters, *adopt or reject;* hence a majority of all votes cast on the proposition is secured. However, we contend that if the voters of the State so desire, they have the right to so amend their Constitution that the highest number of votes shall always be decisive, and it would not be unrepublican.

The legislative assembly is shorn of no power whatever, and we do not think it will be seriously so contended.

Mr. Justice Bean says, in the Kadderly case, *supra*:

"The representative character of the government still remains. The people have simply reserved to themselves a larger share of legislative power, but they have not overthrown the republican form of government, or substituted another in its place. The government is still divided into the legislative, executive and judicial departments, the duties of which are discharged by representatives selected by the people."

Mr. Justice King, in Straw *v.* Harris, 54 Or., *supra*, holds that by the adoption of the initiative and referendum into the Oregon Constitution, the legislative department of the State is divided into two separate and distinct law-making bodies, but that there remains as formerly, but *one legislative department of the State.* That department, however, may operate by either of two methods, through the people by direct vote, or through the people by their representatives.

Oregon does not require different qualifications for the electors for the State legislature, and the

National House of Representatives, and her legislature still elects United States Senators. The acquisition by the National government of sites for forts, arsenals, etc., may still be made by purchase from the State with the consent of the legislature, and presidential electors are appointed in the manner prescribed by the legislature, nor is there any abridgment of any of the powers of the State legislature, to consent to and act with the general government in matters provided in the Federal Constitution and laws. When the Oregon legislature referred the initiative amendment to the people for adoption or rejection, it presumably had in mind all the provisions of the Federal Constitution, and, in our opinion, none of them are contravened by the amendment.

Inexpediency should not be considered. That is for the law-making power of the State.

Appellant in error urges the inexpediency of legislation by direct vote, as adopted by Oregon, although the people do not assemble *en masse*, but vote at the regular voting places and in the regular booths provided for that purpose.

The court has nothing whatever to do with the question of expediency except as it may tend to elucidate the law under consideration. The only proposition is, does the Oregon plan or scheme of government, as outlined in its Constitution, contravene the system of State governments guaranteed by the Federal Constitution. Whether the Oregon system is inexpedient or impractical or expensive, and like matters, are solely for the

law-making power of the State. The courts have no authority to declare a statute unconstitutional for the reason that it is not expedient or that it is impractical, or for the reason that the country is too large and the people too numerous. (Straw *v.* Harris, 54 Or. 424, 433). The court, in the case at bar, can only say whether the Oregon Constitution conflicts with the Federal Constitution or laws in any respect. The appellant says we have a "representative republic," and that such a republic was the particular system of government guaranteed to each of the States. But the Federal Constitution does not so read. The guaranty is for a republican form of government, and any form or scheme of government, republican in character, comes within the purview of the guaranty.

IMPROVED CONDITIONS SINCE ADOPTION OF FEDERAL CONSTITUTION.

The means of communication have improved since the time of Paul Revere's ride. Instead of a paper once a month, every farmer and mechanic has his daily paper delivered by the rural route system. His evenings are spent studying the politics of the Nation. The papers convey to the voter the daily changing political news, the business of the country, its relation with foreign commerce, the amount and quality of state and interstate commerce, in fact, everything of importance that transpires within the State, the Nation, and the world. In 1787, this was impos-

sible. The average farmer of today is as well informed generally as was the average member of the State legislature at the date of the adoption of the Federal Constitution. Also, the means of voting have been placed at almost every man's door. Instead of being obliged to travel dozens of miles and spend several days to vote, very few electors need to use more than half a day, and the larger number but a few minutes.

No one can question that most, if not all, of the objections urged against the initiative method of legislation on account of expediency, etc., have been removed by the progress of the people in education, traveling facilities, and all that goes to make up an intelligent, progressive community.

Even if this court would consider the questions of impracticability, inexpediency, etc., they cannot be urged at the present time with the same force, nor given the same weight as when the Federal Constitution was being prepared. American experience demonstrates that the people can directly, effectively and wisely adopt or reject proposed laws under modern conditions.

ARGUMENT BY C. E. S. WOOD, OF THE PORTLAND, OREGON BAR.

The Attorney General of the State of Oregon has done me the honor to request that I put into writing as an addendum to his brief the substance of my remarks made to him in casual conversation. I am very glad to do this, and appreciate the compliment of such a request; yet I have a certain hesitancy, upon two grounds: First, the point at issue in this appeal is so clearly a political question and so purely a matter of the internal arrangement of the State's political machinery that I am absolutely convinced that the Supreme Court of the United States will never get beyond this point and will dispose of it quite summarily. Second, I bear in mind the traditional reminder that the Supreme Court of the United States is presumed to know some law; and equally it seems to me it is presumed to know those great essential principles which underlay the formation of the Constitution of the United States and which are the A, B, C of our constitutional history. All the speeches, all the pamphlets, all the debates, every form of expression of the revolutionary period show that the words "republican form of government" were used in the widest possible sense, and invariably meant in the mouths of Washington, Hamilton, Jefferson, Madison, Franklin, only a "government of and by the people" as distinguished from tyranny, anarchy, despotism, monarchism, or government

by hereditary specially privileged class. It is true, Hamilton and Madison, in particular instances, arguing for our wide domain, and the wide reach required of the future government, spoke of the disadvantages of the pure democracies, such as the Greek cities, which necessarily were limited in action to small localities, and even there were subject to those errors arising from the passions of a mob, making it perfectly plain that their idea of a pure democracy was the Athenian democracy, a congregation in which every citizen met, debated and voted; and yet continually these same men are speaking of the "republics" of Greece, among other republics in history. This general use of the word "republic" and "republican form of government" is so thoroughly in the atmosphere of the formative time of this government, as meaning only a popular government generally, without regard to internal form, and this is such elementary knowledge that solemn proof of the fact seems to me to savor of pedantry.

With this apology, I call attention to the following:

The clause of the Constitution which is relied on by the appellants, Section 4 of Article IV, is:

"The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion and on application of the legislature or by the executive (when the legislature cannot be convened), against domestic violence."

If there were nothing else to interpret this section, the company in which the words "shall

guarantee a republican form of government" are found show that the intent was that the stronger government,—the Federal government,—guaranteed to protect each of its weaker integral members against invasion, insurrection and the subversion of the will of the people by force, as by some dictator or powerful faction. Mr. King, in speaking in the Massachusetts legislature upon this section, said:

"If the present Constitution of the State was meant to be guaranteed as a fixed form by the United States, would this not be a great defect as precluding any change by the State itself, should it see fit to do so?" (Elliot's Debates, Vol. 2, p. 101).

This clause in the Constitution was adopted by Hamilton in his plan from Randolph's draft first submitted to the convention, and every utterance of Hamilton, Randolph and Jefferson shows that fearful of ambitious men or factions or secret conspiracies from Great Britain, defeating the will of the people, and erecting an oligarchy or a tyranny by force; the usurpers then sheltering themselves behind State sovereignty, the clause here in question was intended only as an insurance by the powerful combination of all the States to each of the States in its individual weakness that each would be protected in maintaining a government of the people, by the people, for the people. Hamilton's utterances are numerous to the effect that "the foundation of a national government must be laid deeper than in the mere

sanction of a delegated authority." "The fabric of the American empire ought to rest on the solid basis of the consent of the people." In No. 57 of the Federalist, Hamilton says that the objection taken by some against the election of the house of representatives by the whole people "strikes at the very root of republican government," and a little further on, in the same essay, says: "The elective mode of obtaining rulers is the characteristic policy of republican government." His battle in the convention for the principle of universal suffrage and that only the free inhabitants should be entitled to representation are known to every school boy; and he said:

"We are now forming a republican government. Real liberty is neither found in despotism nor in the extremes of democracy, but in moderate governments. Those who mean to form a solid republican government ought to proceed to the confines of another government. As long as offices are open to all men and no constitutional rank is established, it is pure republicanism, but if we incline too much to democracy, we shall shoot into a monarchy. The difference of property is already great among us. Commerce and industry will still increase the disparity. Your government must meet this state of things, or combinations in process of time will undermine your system." Secret Debates, p. 184, Mygatt Edition, Tues., June 29. His use of "democracy" is always in the sense of the Athenian democracy.

It is certainly curious that a political measure such as the initiative and referendum, designed to check that great disparity due to commerce and

industry, which he feared; that inefficiency in purely representative legislation due to the combinations which in process of time threaten to undermine our system, should be bombarded with the clause framed by the very man who uttered the above words. His great fear was that some State might lose its pure republicanism by disparities and combinations which might make "the offices no longer open to all men." Hamilton in No. 9 of the Federalist, speaking of the "petty republic of Greece and Italy," shows that "the science of politics has advanced so that the excellencies of republican government may be retained and its imperfections lessened." He discusses the confederate republic of Montesquieu; and the whole essay shows the use of the words "republican government" as meaning only a government by the people.

Again, in No. 51 of the Federalist, he discusses his theories of republican government, showing that he has no particular form in mind, but simply aims at "a government founded on the consent of the governed."

Lastly, Hamilton, the author of the clause in the Constitution we are discussing, and expounding that very clause, says, No. 21 of the Federalist:

"The want of a mutual guarantee of the State governments is another capital imperfection in the federal plan (meaning the old confederacy). There is nothing of this kind in the articles that compose it; and to imply a tacit guarantee from

considerations of utility, would be a still more flagrant departure from the clause which has been mentioned, than to imply a tacit power of coercion from the like considerations. * * * Without a guarantee, the assistance to be derived from the Union, in repelling those domestic dangers, which may sometimes threaten the existence of the State Constitutions, must be renounced. Usurpation may rear its crest in each State, and trample upon the liberties of the people; while the national government could legally do nothing more than behold its encroachments with indignation and regret. A successful faction may erect a tyranny on the ruins of order and law, while no succor could constitutionally be afforded from the union to the friends and supporters of the government. The tempestuous situation, from which Massachusetts has scarcely emerged, evinces that dangers of this kind are not merely speculative. Who can determine what might have been the issue of her late convulsions if the malcontents had been headed by a Caesar or by a Cromwell? * * * The inordinate pride of State importance has suggested to some minds an objection to the principle of a guarantee in the Federal government, as involving an officious interference in the domestic concerns of the members. A scruple of this kind would deprive us of one of the principal advantages to be expected from union, and can only flow from *a misapprehension of the nature of the provision itself. It could be no impediment to reforms of the State Constitutions by a majority of the people in a legal and peaceable mode. This right would remain undiminished. The guarantee could only operate against changes to be effected by violence.*"

This is the interpretation of this constitutional clause by the man who drew it upon Randolph's model, and who battled for its adoption. It is harmonious with its general purport and with common sense; and to have the clause itself raised now as a barrier to those very reforms of the State Constitution made by a majority of the people in a legal and peaceable mode to overcome the corruptions of legislatures and the growing tyranny of great commercial combinations is certainly the *reductio ad absurdum.*

Madison expresses the same views in the 43d Federalist.

There is another consideration: The referendum has tacitly existed in the British Constitution since the power of the House of Commons and constitutional government as we understand it today began with Cromwell and the parliament which imposed terms on Charles Second. By Walpole's time it had become a settled political policy that if the ministry were defeated, three courses lay open to it: Either to resign and let the opposition form a new cabinet; or to purchase and corrupt enough members of the House of Commons to change the majority; or to dissolve parliament and take a referendum to the people on the question at issue. So that at the time of the separation, the referendum at least was a well known part of the British Constitution; and we find Hamilton stating that the British Constitution was the best form attainable by us as a model.

Every State Constitution has been adopted by a referendum, and the referendum always implies the initiative, just as the power to delegate always implies the right to act directly.

What is to be said as to the form of the government of Switzerland? Is it a republic, or not? Yet there, by the will of the people, the initiative and referendum exist in full force, and from this republic we have borrowed them.

The Federal convention met upon the resolution to endeavor to formulate "a republican form of government," but the particular details of that form were the subject of the most extended debate, and ranged all the way from the idea of a loose confederacy, as presented by Mr. Paterson, of New Jersey, to the strong centralized plan drawn up by Hamilton.

I apologize for wasting so much time in proving that the clause in the Constitution meant to the founders, and should mean to us, only a guaranty of a government of the people by the people and a protection against anarchy or despotism or usurpation by violence; and I repeat, it seems an absurd conclusion, with all due deference to the brief of the eminent and learned opposing counsel, to have this clause of the Constitution, designed to protect the people in the right of peaceably changing their form of State government to meet new exigencies, used as the means to prevent their doing that very thing.

Political Science is a growth, an evolution. It cannot remain fixed.

Madison, in the 14th Federalist, might have been holding a brief for the initiative and referendum. He says:

"But why is the experiment of an extended republic to be rejected, merely because it may comprise what is new? Is it not the glory of the people of America, that whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience? To this manly spirit, posterity will be indebted for the possession, and the world for the example, of the *numerous innovations displayed on the American theatre, in favor of private rights and public happiness.*"

C. E. S. Wood.

III.

Nor does the act under consideration violate any of the provisions of Section 1 of the XIV amendment of the Constitution of the United States.

Assuming that the act under consideration was lawfully enacted the taxes levied thereby must be considered a valid exercise of the taxing power of the State in the light of the following authorities.

Opinion of Or. Sup. Ct., record p. 35, and cases cited therein.

Southwestern Oil Co. *v.* Texas, 30 Sup. Ct. Rep. 496, 497; 217 U. S. 114.

Bell's Gap R. Co. *v.* Pennsylvania, 134 U. S. 232, 237.

Home Ins. Co. *v.* New York, 134 U. S. 594.

Connolly *v.* Union Sewer Pipe Co., 184 U. S. 540, 562.

Kentucky R. Tax Case, 115 U. S. 321, 337.

Magoun *v.* Illinois Trust & Savings Bank, 170 U. S. 283, 294.

Amerigan Sugar Refining Co. *v.* Lauisiana, 179 U. S. 89.

W. W. Cargill Co. *v.* Minnesota, 180 U. S. 452, 468.

Cook *v.* Marshall County, 196 U. S., 261, 268, 273, 274.

Armour Packing Co. *v.* Lacy, 200 U. S. 226, 235.

Delaware Railroad Tax Case, 18 Wall. 206, 231.

2 Cooley on Taxation, 3d Ed., 1095.
City of St. Joe *v.* Ernst, 8 S. W. (Mo.) 558.
Producers Oil Co. *v.* Texas, 99 S. W. (Tex.) 157.
State Tax on R. R. Gross Receipts, 15 Wall. 284, 293.

It cannot be claimed in this case that a tax on gross earnings is even incidentally a tax on interstate commerce.

The pleadings show that they are levied upon the gross earnings of the plaintiff in error from business done entirely within the State of Oregon, and fail to show that the plaintiff in error transacts any interstate business. Also, as shown by the pleadings, it is a corporation organized and existing within and pursuant to the laws of the State of Oregon, and so far as is shown by the pleadings, transacting its business wholly within said State. It only remains under the assignment of error, above cited, page 39 of the record, to ascertain whether the taxes so levied are in violation of the due process or equal protection clauses of Section 1 of the Fourteenth Amendment of the United States Constitution.

This case, so far as those questions are concerned, is identical with the case of Southwestern Oil Co. *v.* Texas, 30 Supreme Court Reporter 496, above cited. Both cases arise out of the levy of taxes on the gross earnings of domestic corporations from business done within the State, and the statutes of the two States in that respect are

practically identical as to the levy and collection of taxes, and subjection of persons failing to comply with the statutory provisions to criminal prosecution.

At page 498, Mr. Justice Harlan, speaking for the court, after discussing at some length the effect of the Fourteenth Amendment, with reference to forbidding the States from taking property without due process of law and making the application to the law under consideration, says:

"No element of due process of law seems to be wanting unless it be, as contended by the Oil Company, that the penalties prescribed for failing to make the 'reports' required by the statute are so severe and exacting as to make it unsafe for the taxpayer to question the validity of such penalties, and thereby interfere with or suspend the collection of the taxes by insisting that they have been imposed in disregard of due process of law. But this point, as to the severity and exacting character of the penalties, need not be now considered, because no penalties are claimed by the State in this action and no judgment therefor was rendered. Besides, the provision as to penalties is not so necessarily connected with the other parts of the statute as to vitiate the entire act, even if that provision should be held to be void. The right of the State, by a civil suit, to recover the taxes imposed, is wholly independent of its right, by suit or prosecution, to recover the prescribed penalties. If the provisions as to penalties should be stricken down, there will still be left a complete act providing for the collection by civil suit of the taxes due the State,"

and further discussing the question under the Fourteenth Amendment as to denying the equal protection of the laws, he says:

"The State, keeping within the limits of its own fundamental law, can adopt any system of taxation or any classification that it deems best for the common good and the maintenance of its government, provided such classification be not in violation of the Fourteenth Amendment."

He further quotes from the leading cases upon the subject of special assessments and exemptions under the State laws, and shows that none of these are in violation of the equal protection clause of the Fourteenth Amendment. We hesitate to quote the entire opinion, but respectfully call it to the attention of the court as conclusively deciding all questions in the case at bar, as to whether the plaintiff in error is denied the equal protection of the law, or deprived of his property without due process of law.

In the State court, the only questions as to the invalidity of the taxes, regardless of the manner of their imposition, was as to whether they constitute double taxation, or a violation of Section 1 of the Fourteenth Amendment of the Federal Constitution. The plaintiff in error having paid its license fees required of it to exist as a corporation in the State of Oregon and its taxes on tangible property, and having alleged that these included a tax on its franchise claimed double taxation. On the part of the State it is contended that the gross earnings tax now under consideration is an occupation tax, but even if called a tax on the franchise as property valued in proportion

to its gross earnings, the question is practically the same. As shown by the opinion of the court in the record herein, it was held that plaintiff in error is not subjected to double taxation on any of these accounts, and that it had not paid any ad valorem tax on its franchise since there was no law authorizing such a tax at the time of the imposition of the gross earnings tax now under consideration. Whether this is an ad valorem tax, as claimed by the State, is not decided by the State court, but it is simply held that it is not double taxation on the franchise on account of the paying of a license fee to exist as a corporation, or the paying of taxes on its tangible property, and whether this is an ad valorem tax on its franchise or an occupation tax is not now material to the discussion. It might be either, and still not be double taxation or a discrimination against the plaintiff in error, so as to deny it the equal protection of the laws, or deprive it of its property without due process of law.

In several of the more recent cases in this court, involving the validity of State taxation of corporations, the tax has been held invalid, but mainly upon the ground of interference with interstate commerce, which, as already shown, does not arise in this case.

In Southwestern Oil Co. *v.* Texas, 217 U. S. 114, 30 Supreme Court Reporter, before cited, at page 497 the court says:

"In this court it (plaintiff in error) contends only that Section 9 of the statute contravenes the

Fourteenth Amendment. In our consideration of that proposition, we assume, in conformity with the decision of the State court, that the statute is not in violation of any provision of the Constitution or statute of Texas. That is a local question with which this court is not concerned on this writ of error. We are only concerned to inquire whether the statute is inconsistent with the Fourteenth Amendment, either as to depriving the taxpayer of property without due process of law or denying the equal protection of the laws."

In the opinion of the State court in the case at bar, page 35 of the record, it is conclusively shown that the tax under consideration does not violate any provision of the State Constitution or statutes, and this court is powerless to review that question even if the State court were in error. (Poydras De La Lande *v.* Louisiana, 18 Howard 192).

In the Texas case, the question of violation of the Fourteenth Amendment was raised, and there was also an assignment of error that the State court should have held the statute invalid as laying a tax or burden upon interstate commerce. It will be noticed by the answer of plaintiff in error and the order of the court, found at page 23 of the record herein, striking out paragraphs 24, 25, 26 and 27 of said answer, upon the application of plaintiff in error, that no question of interstate commerce can arise on the pleadings, since it is not shown that the gross earnings taxed under the statute, or any part of them, were derived from interstate commerce, that part of the

answer that might relate to interstate commerce having been stricken out by voluntary application of plaintiff in error, nor do we find even in the assignments of error in the record herein anything relating to the interstate commerce clause of the Constitution, but on page 39 of the record, in paragraph J of plaintiff's third assignment of error, it assigns a violation of Section 1 of the Fourteenth Amendment of the United States Constitution. This is the only specification of any violation of the United States Constitution, laws, or treaties, other than those relating to the political complexion of the State government.

We cannot refrain from again quoting from Southwestern Oil Company *v.* Texas, where the court, in discussing the contention that the Texas statute was class legislation, uses the following language (217 U. S., at p. 121):

"It is not questioned that the State may classify occupations for purposes of taxation. In its discretion it may tax all, or it may tax one or some, taking care to accord all *in the same class* equality of rights. The statute in respect of the particular class of wholesale dealers mentioned in it is to be referred to the governmental power of the State, in its discretion, to classify occupations for purposes of taxation. The State, keeping within the limits of its own fundamental law, can adopt any system of taxation or any classification that it deems best by it for the common good and the maintenance of its government, provided such classification be not in violation of the Fourteenth Amendment."

And on the succeeding pages, the court quotes from a number of the leading cases in the United States Supreme Court, announcing the same doctrine, and concludes on page 126, by saying:

"That so far as the power of the United States is concerned, the State has the right by any rule it deems proper to classify persons or businesses for the purposes of taxation, subject to the condition that such classification shall not be in violation of the Constitution of the United States. That the requirement by the State that all wholesale dealers in specified articles shall pay a tax of a given amount on their occupation without exacting a similar tax on the occupations of wholesale dealers in other articles, cannot, on the face of the statute or by reason of any facts within the judicial knowledge of the court, be held, within the meaning of the Fourteenth Amendment, to deprive the taxpayer of his property without due process of law, or to deny him the equal protection of the laws. * * *"

In the case of Belle's Gap Road Company *v.* Pennsylvania, 134 U. S. 232, 237, the court says (S. C. R. 533-535):

"The provision in the Fourteenth Amendment that no State shall deny to any person within its jurisdiction the equal protection of the laws was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may if it chooses exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various pro-

ducts; it may tax real estate and personal property in a different manner. * * * But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject, that would include all cases. They must be decided as they arise. *We think that we are safe in saying, that the Fourteenth Amendment was not intended to compel the States to adopt an iron rule of equal taxation.* * * *" (Italics ours).

In Connolly *v.* Union Sewer Pipe Co., 184 U. S. 540, 562:

"A tax may be imposed only upon certain callings and trades, for when the State exerts its power to tax, it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. It would be an intolerable burden if a State could not tax any property or any callings unless at the same time it taxed all property or all callings. Its discretion in such matters is very great and should be exercised solely with reference to the general welfare as involved in the necessity of taxation for the support of the State. A State may in its wisdom classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States, so long as the classification does not invade rights secured by the Constitution of the United States."

In Singer Manufacturing Company *v.* Wright, 97 Ga. 114, at page 117, the court in discussing the authority of the State to classify persons and callings for the purpose of taxation, says:

"The general assembly can tax the occupation of all persons engaged in the liquor traffic, but if it saw proper it could undoubtedly impose an occupation tax upon those only who sold liquors at wholesale. So, it may impose an occupation tax upon persons engaged in the sewing machine business without being constrained to make the tax universal in its operation upon all persons engaged in all branches of that business," and on the following pages continues:

"The plaintiff contends that the tax is not uniform because no tax is required of retailers of machines who are not manufacturers. This contention, in view of what has already been said, cannot be sound, for if the right to classify at all is conceded (and we have shown it must be) even an arbitrary classification would not for that reason alone be unconstitutional, but as just intimated, we do not wish to be understood as saying that the classification made in this instance is arbitrary or unreasonable. It was not necessary to the legality or fairness of the tax that all retailers of machines should be included and required to pay the same amount. The general assembly might well deem it in accord with the sound public policy to encourage the small dealer in his initial efforts to build up a business by exempting him from a tax he could ill-afford to pay, and taxing others in the same line of trade but doing a business the volume of which warranted the additional burden of an occupation tax."

In the light of the foregoing authorities, we fail to see in the Oregon act under consideration herein the slightest infringment of the principles of Section 1 of the Fourteenth Amendment, and refrain from further discussion of the question.

Also, it seems clear from the history of the American people and their government, the action of Congress and the President, in the admission of new States, and the decisions of this court and of the Supreme Courts of many of the States, hereinbefore cited, that the question of what constitutes a republican form of government under the Constitution of the United States is wholly political, and, therefore, beyond the jurisdiction of this court.

However, if the court shall finally conclude to take jurisdiction, we respectfully submit that in any case where there is doubt as to the constitutionality of a law enacted by Congress or the people of a State, the doubt should be resolved in favor of the enactment. The uniform decision of courts, both Federal and State, as we understand them, is to the effect that a statute will not be declared unconstitutional unless it obviously contravenes the fundamental law, and the same rule applies when measuring a State Constitution by the Federal, as in this case. Applying this principle in the case at bar, the action of Congress and the President, admitting Oklahoma and Arizona into the Union of States, with Constitutions including the initiative and referendum; the admission and seating by Congress, without question,

of the Senators and Representatives from South Dakota, Utah, Oregon, and other States, covering the period of twelve years since the adoption of the initiative and referendum by South Dakota; the decisions of State courts that their governments are republican in form, rendered since the adoption of the initiative and referendum provisions of their State Constitutions; the fact that if a somewhat crude, an effective form of initiative for proposing and adopting constitutional amendments was a part of the Constitution of Georgia when the Federal Constitution was adopted; that the initiative and referendum is now and has been from the earliest settlements recognized as a part of the system of local governments in many of the most important States of the Union; we respectfully submit that both precedent and logic unite in approval of the decision of the State court herein, and that the same should be affirmed.

A. M. CRAWFORD, *Attorney General,*
Attorney for Respondent, in Error.

I. H. VAN WINKLE,
A. M. CRAWFORD,
W. S. U'REN,
C. E. S. WOOD,
Of Counsel.

POINT OF CONTENTION.

Oregon Constitution, Art. IV, SECTION 1.

"The legislative authority of the State shall be vested in a legislative assembly, consisting of a Senate and House of Representatives, but the people reserve to themselves power to propose laws and amendments to the constitution and to enact or reject the same at the polls, independent of the legislative assembly."

Is a tax law invalid under the Constitution of the United States which is thus proposed and thus enacted by the people at the polls?

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Error - When "appellant" appears, read "plaintiff in error."

The Issue: United States Constitution, Article IV, § 4.

The real issue raised by the assignment of errors is to be found in the eighteenth thereof, claiming an invasion of appellant's rights under U. S. Constitution, Art. IV, § 4, as follows:

"Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion: and on application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence."

(Exact form as engrossed;—Farrand, Records of the Federal convention, Vol. II, p. 662.)

The other claims under Art. I, §§ 2, 3, 4, 8, 10; Art. IV, § 3; Art. V, relate to the requirements of the U. S. Constitution for legislative action in the States. It may be conceded that these requirements would impose upon the States the duty to maintain legislatures for national purposes, and the short answer to the appellant's claims in this regard is that such a legislature is maintained in Oregon in due form and with full powers to conform to the requirements of the U. S. Constitution.

The claims under the Article of Amendment XIV are not to be considered, because the State of Oregon has promulgated the tax law of which appellants complain, every citizen of Oregon is subject to laws so enacted, and there was due process and equal protection accorded to the appellant pursuant to the Constitution of Oregon. That constitution and

the form of law-making it provides are not subject to revision by this court unless jurisdiction is taken under above Art. IV, § 4.

The Supreme Court of Oregon has determined that there is no infraction of the Constitutions of Oregon and the United States.

"The courts of the U. S. adopt and follow the decisions of the State Courts on questions which concern merely the constitution and laws of the State."

Luther *v.* Borden, 7 How. 1.
Duncan *v.* McCall, 139 U. S. 449.
Taylor *v.* Beckham, 178 U. S. 578.

"The people of the States created, the people of the States can only change, its Constitution. Upon this power there is no other limitation but that imposed by the Constitution of the United States; that it must be of the Republican form."

Chisholm *v.* Georgia, 2 Dall. 448.

I. The Subject-Matter of Contention.

A. *THE OREGON SYSTEM.*

"The legislative power of the State shall be vested in a legislative assembly—but the people reserve to themselves power to propose laws and amendments to the Constitution and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly."

"The first power is the initiative" based upon a petition by eight per cent of the legal voters.

"The second power is the referendum" based upon a petition by five per cent of the legal voters.

Such is the plan at issue, adopted by Oregon in 1902.

1. THE PRECEDENT IN SWITZERLAND.

It was not an experiment. Some of the Swiss Cantons had legislated in mass meetings from days of antiquity. After the republic was formed in 1848 by union of the Cantons, all the vices to which free governments are subject rent the politics of the republic. Political bosses, legislative corruption, corporate influences, partisan violence and intrigue were the rule in political life.

In 1874 the referendum was adopted in national affairs, and in 1891 the initiative was added. Experience justified these measures in the Cantons and republic. The evils abated, popular verdicts were found to be considerate and wise, party virulence was allayed, experienced legislators were retained in office, corruption ceased. The system became fixed in the confidence and affections of the people, until it was unshakable. This republic is the best governed country on earth.

Hon. N. Droz, ex-President of Switzerland, said of it: "Under the influence of the referendum a profound change has come over the spirit of Parliament and people. The net result has been a great tranquilizing of public life."

Prof. Charles Borgeaud of the University of Geneva, wrote "The Referendum has won its case. Unquestionably it has proved a boon to Switzerland and has no more enemies of any following in the generation of to-day."

The only Canton in which the political boss and corrupt influences remained dominant was and is Freibourg, where direct legislation did not exist and could not be secured under the tyrannical and venal rule of a political dictator.

South Dakota adopted this system in 1898. Such was the experience which warranted Oregon in adopting this system.

2. DELIBERATION IN ADOPTION.

The passage of the constitutional amendment for direct legislation in Oregon was not the result of caprice. It had

long agitation in the press and party conventions. In the legislature of 1899 there were only 13 opposing votes. Both political parties approved it in their conventions of 1900. In the legislature of 1901 there was but one opposing vote and in 1902, when the vote was taken, all the political conventions favored it, and it passed by 62,024 yeas to 5,668 nays.

It should be noted that this amendment was the result of the vote of the legislature, submitting it to popular vote according to the then existing constitutional forms.

Not only has Oregon adopted the constitutional amendment, but in 1910 by vote 23,143 yeas to 59,974 nays (questions submitted Nos. 304, 305) on reference to a referendum by the legislature, a proposition for a constitutional convention was defeated.

Oregon Election Pamphlet, 1910, p. 18.

The argument used against this convention and which defeated the proposition was that its purpose was to have the convention take out the Initiative, Referendum and Recall from the constitution and then proclaim its enactment without submission to the people for ratification.

3. PRACTICABILITY THROUGH THE MODERN BALLOT.

It must be borne in mind that this case involves a method of procedure in State affairs which was not in 1787 practicable. So far was the ballot then unknown that the people of New York in framing their first constitution gave the legislature authority to make a trial of the ballot system and to repeal the provisions if the system did not prove practicable. Furthermore, distances and methods of communication offered at that time obstacles which are now inconsiderable. The possibility of extending a town meeting to the limits of a State had not occurred to anyone at that time owing to the apparent physical difficulties. Now, however, experience has demonstrated that an actual poll of the people can be taken upon

any proposition with ease and certainty. In considering, therefore, all old authorities which suggest that the delegation of legislative power is an essential feature of our form of government, we must accept such statements with the limitations of the then existing methods. All statements of this nature must be regarded as *obiter dicta* and not applicable to the existing conditions which have been produced by the growth and development of our electoral system.

4. EXCLUSION OF "CAPRICE" AND "MOB RULE."

There is another feature which must materially qualify the views of all previous statesmen and judges. In contemplation of previously existing Democratic forms, the actual physical assemblage in one place of all the people was involved. No doubt there may be in popular assemblages a high degree of nervous tension, susceptibility to the influences of speech, of cabal and of skillful leadership. A condition of excitement may be created which is not consistent with careful deliberation and which may contain too much of the element of sentiment or sympathy.

Even these conditions may not be inconsistent with decisions which in the long run are righteous and advisable; there may be occasional lapses from good judgment, but the town meetings of New England are living illustrations of the general reliability of popular assemblages in the decision of public questions.

There has been ample opportunity in 300 years of experience with these gatherings to test the dangers of what is so lightly designated as "mob law," and "the caprice of the majority," but it may be said that no institution in our country has so well stood the test of experience as the New England town meeting.

The jury system is open to similar objections, but it has persisted nonetheless and has become one of the cornerstones of the fabric of human liberty.

These considerations emphasize the absence of the dangers to which popular gatherings are exposed by physical contact, where such methods of deliberation are provided as we find in Oregon under the direct legislation system. Petitions for legislation must be filed three months before the day of election. Not only are the questions to be considered matters of general public notoriety, but the State of Oregon provides that citizens may offer argument for and against the proposed measures and these arguments, together with the text of the proposal, are printed at the expense of the State and placed in the hands of all the voters. There is thus laid before the voters complete information as to the measures upon which they are to vote, and carefully epitomized arguments for and against them. These matters are before the voter in his home, the object of study, deliberation and discussion. He is freed from passion or influence in the consideration of his duty as a voter, and probably in the history of Republican institutions, no better system has been devised for securing from the voter a calm, dispassionate and patriotic decision as to his duty with respect to proposed legislation. "Mob Rule" is far removed from this system.

It will also be observed that the voter is not called upon to study the character of men but the merits of measures, and an entire shifting of the character of political discussion is thus accomplished. Personalities of men cease to be determining factors when the merits of concrete propositions become the objects of consideration. The training of the voters in their public duties is such as to practically revolutionize the character of political controversies, to elevate the standard of citizenship, suppress passion and prejudice and to bring nearer than ever to perfect form, the deliberations of the people upon their own affairs.

B. *THE DEMAND FOR THE SYSTEM.*

1. IMPERFECT POLITICAL CONDITIONS.

It is apparent that our country is in a condition of reaction against the control of privilege as powerful as that of France in 1792, of England in 1838, of Switzerland in 1848.

In France the republic was created, in England parliamentary government became a reality, and in Switzerland the Union of States was perfected; here we are perfecting our Democracy. The present movement constitutes the most momentous political revolution in our history, conducted without bloodshed and even without acrimonious political contests. It is a movement economic in its nature and accordingly steady and irresistible. Its objects are political, and it moves on like a tidal-wave which legislatures and courts cannot halt.

The causes of this movement are apparent. Political organizations have not been responsive to the popular will. The effort to obtain good government by the selection of "good men" has failed. Legislators have become the people's masters in the exercise of unlimited power. Party platforms are not regarded as pledges. The people are unable to trust their servants. A power has developed which dominates politicians, parties and public servants. Evidences of repeating, bribery, corruption and perversion of delegates, representatives and officials in cities and States have persisted, and even the judiciary has at times been found subject to influences, hostile to the people's interests. The average citizen has abandoned efforts to regulate party machinery and to participate in party caucuses.

The new political movement aims to clear the avenues between the people and their institutions.

The perversion of party caucuses has been met by the plan of direct nomination of candidates at the polls. Even the direct nomination of delegates to Presidential conventions is being accepted; repeated scandals and notorious corruption of

legislatures in the election of U. S. Senators have caused two-thirds of the States to devise methods of circumventing the constitutional method of election by the legislatures, and it is probable that in the immediate future the National Constitution will be amended to secure direct election of Senators by the people.

The numerous laws of States for the prevention of corrupt practices and the limitation of campaign expenditures have been supplemented by national legislation, which is probably but the beginning of drastic enactments to maintain the purity of elections.

2. FAILURES OF THE LEGISLATIVE SYSTEM.

The founders of the Republic dreaded the power of the executive. Patrick Henry inveighed against it. Jefferson insisted with impassioned force that the Republic would fall through the usurpation of power by the judicial department.

Prophecy takes a hard test by the light of experience. All fear of the executive has ceased after more than a century of trial. For the first time the judiciary has become a subject of apprehension in the last few years.

But it is the legislative department that has proved the weakest of the departments of State.

The people are strengthening this branch of Democratic government by applying more Democracy.

The Sovereignty is being placed in practice, where it exists in theory, with the people; the instrument is Direct Legislation.

In adopting this system there have been no interferences with the regular operations of the customary legislative machinery. Representative government remains, but its products are no longer beyond popular reach. Vicious and corrupted acts can no longer be fastened upon the people against the will of the majority.

Experience has proven that it is not safe to trust delegates with unlimited power to make laws, and the question presented in this case is whether there remains in the people the power to apply controlling influences to them.

The history of this year's legislation furnishes a long list of broken pledges.

The governors of Colorado, Maine, New York, New Hampshire have publicly denounced the legislatures of their States for failure to redeem the direct promises of party platforms.

Governor Shafroth of Colorado declared that in the longest legislative session in thirty years not a pledge has been redeemed.

In Maine a direct primary act was refused by the legislature and at the polls under the "initiative" amendment of the Constitution, the measure was adopted by vote of 55,840 yeas to 17,751 nays.

In 1902, under a law permitting an expression of public opinion at the polls, the people of Illinois favored by a vote of 428,000 to 87,000 a Constitutional amendment providing the initiative and referendum. The legislatures for eight years took no action. In 1910 the people again made the demand by vote of 447,908 yeas to 128,398 nays. All the political platforms indorsed it. The legislature this year has refused to pass the measure.

Two investigations are now in progress involving corruption in the election of Senators of the United States; it is not denied that $107,793 was expended to secure the election of a Senator by the legislature of Wisconsin.

Even in England faith in Parliamentary government has been shaken. Mr. Lecky says:

"A growing distrust and contempt for representative bodies has been one of the most characteristic features of the closing years of the nineteenth century."

Democracy *v.* Liberty, I. pp. 142, 143.

Mr. Dicey remarks:

"Faith in Parliaments has undergone an eclipse."

13 Harvard Law Rev. 73, 74.

Gov. Woodrow Wilson has described the political situation as follows:

"Many of the old formulas of our business and of our politics have been outgrown. We still revere 'representative government,' but we are forced to admit that—the governments we actually have have been deprived of their representative character. They do not represent us. They are filtered too fine through the sieve of secret caucuses and other machine processes; there are too many conventions preceded by too many private conferences between us and the persons through whom we legislate and conduct our governments.

We, the people, have not free access enough to our own agents or direct enough control over them. We mean by one change or another to make our governments genuinely popular and representative again. We are cutting away *anomalies not institutions.*" Boston Common, May 13, 1911.

Such are the failures and scandals which have created distrust in parties and legislatures and caused the people to secure direct control of their political machinery, their officials and legislative bodies through direct primaries, elections and legislation.

"States and governments were made for man; and at the same time how true it is that his creatures and servants have first deceived, next vilified and at last oppressed their master and maker."

Mr. Justice Wilson in Chisholm *v.* Georgia, 2 Dal. 455.

C. *THE EXTENSION OF THE SYSTEM.*

1. CONSTITUTIONAL AMENDMENTS ADOPTED.

The system of the initiative and referendum has been adopted by popular votes as follows:

State.	Year.	Yea.	Nay.
South Dakota,	1898		
Utah,	1900		
Oregon,	1902	62024	5668
Montana,	1906	36374	6616
Oklahoma,	1907	180333	73059
Maine,	1908	51991	23712
Missouri,	1908	177615	147290
Arkansas,	1910	91363	39680
Colorado,	1910	87141	28698
Arizona,	1911		
California (latest unofficial),	1911	138181	44850

Utah voted an amendment for direct legislation in 1900 but left it to be executed through enabling acts of the legislature, which acts have not been passed.

Thus eleven States have already incorporated the initiative and referendum into their Constitutions.

The legislatures of the following States have voted to submit the initiative and referendum for popular ratification: Nebraska, Wisconsin, No. Dakota, Wyoming, Washington.

In Nevada, where the referendum is in the Constitution, the legislature passed this year a resolve for the initiative for the second time, and the amendment is to be voted on at the next election.

As such amendments (excepting a defective proposal in Missouri in 1904) have never been rejected by popular vote in any State, it is not impossible that, by the time the court

reaches its decision in this case, these six States will have been added to the list and that seventeen States will then have adopted this system.

2. MOVEMENTS IN OTHER STATES.

The legislature of Idaho has submitted for popular vote the Constitutional amendment for the referendum.

In New Mexico the Democratic platform declared for the initiative and referendum, but only the referendum was incorporated in the Constitution.

Illinois in 1901 adopted an advisory initiative, and as above stated (I. B. 2), the legislature of the State has refused to accede to the demands of enormous majorities in favor of the Constitutional amendment for the initiative and referendum.

In Illinois (in 1910) both party platforms favored the initiative and referendum.

In 1906 the people of Delaware by popular vote instructed their legislature to provide a Constitutional amendment for the initiative and referendum.

In Delaware March 17th, 1911, the House of Representatives voted on the Constitutional amendment for the initiative and referendum by 16 yeas to 9 nays, 2/3 vote being necessary for a passage.

The municipalities in more than one-half of the States of the Union have received charters containing the initiative and referendum.

In Iowa the recent legislature rejected the amendment in the House by a vote of 58 yeas to 42 nays.

In Kansas all the political parties declared for the initiative and referendum in their platforms of 1910, but the measure failed of the necessary 2/3 vote in the legislature. The House of Representatives passed the measure by 107 yeas to 10 nays; the Senate defeated the measure by a vote of 23 yeas to 15 nays, a 2/3 vote being required in both Houses. Gov. Stubbs was elected on the platform pledged to the initiative and referendum.

In Michigan a vote for the Constitutional amendment passed the House by 74 yeas to 20 nays, but the Senate defeated the amendment by a vote of 15 yeas to 14 nays, a 2/3 vote being required.

In Minnesota, the Democratic platform declared for this Constitutional amendment, but the resolve was defeated in the legislature.

In Massachusetts a Constitutional amendment was defeated June 27th, 1911 by a vote of 125 yeas to 75 nays, 2/3 being required.

In West Virginia Gov. Dawson in his annual message endorsed the initiative and referendum and prophesied the passage of the resolve.

In Ohio, Gov. Harmon was elected in 1909 on a platform pledged to the initiative and referendum.

In New Hampshire the Democratic platform of 1910 pledged the party to the initiative and referendum.

In New Jersey the present Governor is in favor of such amendment.

In Pennsylvania in May, 1911, the judiciary committees of both branches of the legislature reported favorably upon the passage of a Constitutional amendment for the initiative and referendum.

3. NATIONAL MOVEMENT.

The Democratic National platform adopted at Kansas City in 1900 declard for the initiative and referendum.

On the 12th day of June, 1911, a memorial was presented in the Senate of the United States from both branches of the Wisconsin legislature calling for the submission of an amendment to the United States Constitution to provide for the Initiative, Referendum and Recall for legislation and officials and the initiative for Constitutional amendments.

Within the dominant party a new organization has been formed entitled the "National Progressive Republican League.

It has leaders of great ability, and from the Mississippi to the Pacific is rapidly obtaining control; it proposes to contest for the control of the next National Republican convention. Its platform of principles is confined to five measures, designed for the sole end "that the people may control and hold their officers responsible." These are the measures:

1 Direct election of U. S. Senators by the people.

2 Direct primaries for nomination of elective officers.

3 Direct election of delegates to National conventions.

4 Constitutional amendments for Initiative, Referendum and Recall.

5 Thoroughgoing corrupt-practices' act.

The force of this movement is made more powerful by the fact that both political parties are involved in it, and that in many States all the parties have united in its favor.

Sen. Works of California, April 10-'11, in the Senate spoke as follows:

"Congress need not delude itself with the belief that this demand for direct legislation comes from fanatics and radical reformers only. The demand is universal and is supported by the best citizens in the country without regard to party. The absolute necessity for some legislation that will put the people in possession and control of their government, and drive the interests and political bosses out of politics, and the official life of the nation is too evident to admit of question."

This sweeping assertion of the strength of the popular demand has been justified by the enormous majority of the votes recently cast in the Senator's own State in approval of the Initiative, Referendum and Recall.

As in all the cases involving Art. IV, §4, this Court has denied jurisdiction, scant consideration has been given to the interpretation and construction of the provision, "the United

States shall guarantee to every State in this Union a Republican form of government."

If in the case at bar this Court should undertake to review the powers, political or judicial, which are conferred by this provision, it is submitted that many statements made *obiter* concerning it, may need explanation and revision. Many important questions yet unconsidered may be or become of supreme importance, which are involved in the terms of

II. The Guaranty.

A. *THE DEMAND FOR THE GUARANTY.*

Quotations could be multiplied to show that the entire direction of the people's thought was toward the protection of national as well as State governments against the return of the tyrannies which they had just thrown off by rebellion.

"In truth," said Jefferson, "the abuses of monarchy had so much filled all the space of political contemplation that we imagined everything Republican, which was not monarchy." Letter to Kerschieval, July 12-1816.

The sole purpose of the guaranty clause was to protect the Union and States against monarchial and aristocratic changes.

Cooley Constitutional Limitations (7th Ed.) p. 28.

"to defend the system against aristocratic or monarchial invasions," says Madison. Federalist, Letter 43.

Patrick Henry cried out against the Constitution, "away with your president; we shall have a king; the army will salute him Monarch!"

Franklin feared that the government would result in monarchy. Elliot's Debates.

From the Philadelphia convention not a word can be cited to show that the fear of an extension of popular sovereignty had any place in the minds of the delegates.

"At this rate," said Nathaniel Gorham of Massachusetts, "an enterprising citizen might erect the standard of monarchy in a particular State; might extend his views from State to State, and threaten to establish a tyranny over the whole, and the general government be compelled to remain an inactive witness to its own destruction." Elliot's Debates, Vol V., p. 333.

"The opposition to the Constitution came not from any apprehension of danger from the extent of power reserved to the States, but on the other hand, entirely through fear of what might result from the exercise of the power granted to the central government.

South Carolina *v.* U. S., 199 U. S. 457.

B. *HISTORY OF THE GUARANTY CLAUSE.*

The act of the Confederation Congress, April 23d, 1784, contained the precedent for this provision.

Gerry of Massachusetts, Sherman of Connecticut, Spaight of North Carolina, later members of the Constitutional Convention of 1787 voted on the measure giving power to the people of the northwest territory to form governments, and providing "Sixth. That their respective governments shall be Republican."

A later act of the Confederation Congress of July 13th, 1787, contained the same provision.

The history of the progress of Article 4, Section 4, in the Constitutional Convention of 1787 appears from Elliot's Debates, Volume 5, to be as follows:

The measure first appeared in what is known as the Virginia form introduced by Edmund Randolph in this shape,

Art. XI, "Resolved that a republican form of government and the territory of each state except in the instance of a voluntary function of government and territory ought to be guaranteed by the United States to each state." (Page 122)

Later an amended form of the article appeared as follows:

"That a republican constitution and its existing laws ought to be guaranteed to each state by the United States." (Page 182.)

James Madison, Jr., Virginia, moved to substitute, "That the constitutional authority of the states shall be guaranteed to them respectively against domestic as well as foreign violence."

William Churchill Houston of New Jersey objected to perpetuating the existing constitutions, instancing that of Georgia as "a very bad one." (Page 333.)

Edmund Randolph moved to add as an amendment "And that no state be at liberty to form any other than a republican government." (Page 333.)

James Wilson (Pa) moved as a better expression of the idea "that a republican form of government shall be guaranteed to each state and that each state shall be protected against foreign and domestic violence." (page 333.)

Mr. Madison and Mr. Randolph thereupon withdrew their propositions.

The article emerged from the committee on detail as "The United States shall guaranty to each state a republican form of government" etc. (page 381) and the final form was the same excepting for the substitution of the word "every" for "each" and the addition of the words, "in this Union."

C. *WHAT IS THE GUARANTY?*

The word "guaranty" has, and at that time had, a well defined legal significance.

"A guaranty is a promise to answer for the payment of some debt or the performance of some duty, in the case of the failure of another person, who in the first instance is liable."

Kent's Com. (12 Ed.) Vol. IV, p. 121.

"The contract of guaranty is a collateral undertaking. It cannot exist without the presence of a main or substantive liability to which it is collateral. If there is no such substantive liability on the part of a third person either express or implied, that is to say if there is no debt, default or miscarriage, present or prospective, there is nothing to guarantee and hence can be no contract of guaranty."

Brandt on Suretyship and Guaranty, §1, n. 1, p. 5.

This word was not adopted carelessly or without meaning It was clearly distinguished from the later promise of protection, and there is also significance in the fact that the guaranty was to "every State" while the promise of protection was to each. These men long skilled in the framing of their revolutionary documents understood the use of words.

Edmund Randolph, Alexander Hamilton, Gouverneur Morris, Wm. C. Houston, John Rutledge, James Wilson, who debated this article were lawyers, and understood the exact legal meaning of the word "guaranty."

D. *WHO ARE THE PARTIES TO THE GUARANTY?*

A guaranty involves three distinct parties:

1st the promissee, the beneficiary.

2d the promissor, the original obligor.

3d the guarantor, assuring the promissee for the benefit of the promissor.

A guaranty is an agreement not for the interest of the guarantor. The promissee is directly named to wit "every State in this Union;" the original promissor is also included in this category. Each State becomes the original promissor to every State, that it will maintain a Republican form for the benefit of each and every State.

The undertaking of the States themselves under the guaranty clause may be a repetition of the description of the social compact in the Massachusetts Constitution—"the people covenants with each citizen and each citizen covenants with the whole people, &c," which being applied would read, "The States covenant with each State and each State covenants with all the States, &c," and the undertaking of the United States is to guarantee the performance of these covenants.

E. *WHO HAS THE POWER OF INITIATIVE?*

This question must be answered in contemplation of the powers described and reserved in the Constitution of the United States. By Art. 1, § 1, the legislative powers of Congress are confined to the powers "herein granted." Therefore the Congress takes away no powers from the people of the States, except those contained within the pages of the United States Constitution.

But the peoples of the States forced upon the Constitution explicit additional declarations as to the reserved powers of the people of the States. Art. IX declares, "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others *retained by the people*," and

Amend X. "The powers not delegated to the United States by the Constitution, *nor prohibited by it to the States* are reserved to the States respectively *or to the people*."

1. A STATE MUST MAKE THE DEMAND.

Clearly only the promisee can demand enforcement and the only promisees under this guaranty are the States.

Judge Story ("Constitution," Vol. II, § 1815) declares that this section of Art. 4 was phrased to prevent the intermedling of the National government with the States, and quotes Mr. Madison as his authority.

George Ticknor Curtis (Const. History of U. S., Vol. 1, p. 363) declares this section to be for the security of the States.

John Randolph Tucker ("United States" Vol. II, § 311) declares that the power of the initiative in the National government would "make this clause, intended for protection, an excuse for destructive invasion."

If the promisees are satisfied how shall the guarantor intervene?

A state will not move unless it regards the offending State as violating republican forms, and it will be guided in making its demand not upon the judgment of the United States but upon its own interpretation of the meaning of republican forms.

It might even be that republican forms were plainly involved, yet a dependance upon the ability of the people to restore them, might prevent another State or even the State itself from asking national interference. The States might not desire to make a demand for enforcement, and if the promisees were all satisfied, there could be no basis for enforcement. It may be a matter of mighty practical importance whether the U. S. can interfere of its own motion in a State's affairs under this Article, and if it cannot it seems to be plain, that another State and not this court has the sole right to judge whether the republican form is involved and whether the United States should be called upon to interfere.

2. A CITIZEN CANNOT DEMAND ENFORCEMENT.

The appellant has no standing in this Court. The guaranty is not to a citizen, but to every State of the Union. Whether the political organization called the State or the people in general is meant to be the object of guaranty is immaterial. The State alone can call for the guaranty.

Later in the article the call for assistance against internal violence is limited to legislature or governor, but when the guaranty is demanded it seems clear that a majority of the people or their recognized representative authority may call for it and none other. No one citizen can appeal even to Congress to enforce this guaranty. A minority would be insufficient and much

less can such an appeal be made by an individual to this court to ignore the recognized course of self-government in any State.

It is notable that the promise to "protect against domestic violence" is a direct promise imposing an original obligation upon the United States. Yet there is a specific limitation upon the persons who can call for the protection.

It would be the very farce of construction should it be held that upon a collateral obligation to states, a private citizen of such state could set the machinery of the national government or of this court in motion against a state.

8% of the voters of Rhode Island form the constituency of a majority of the senators in the Rhode Island Legislature; thus a fraction of over 4% of the voters can block all legislation.

A priori this would be clearly the denial of a Republican form; yet it would be a surprise should one citizen of that State appear here or before Congress to demand enforcement of the guaranty against such forms.

The admission of a private citizen to ask for the enforcement of this guaranty must apply to Congress as well as to this Court. One citizen could always be found to serve the purpose of any cabal, which might wish to turn the armies of the nation into a state to change alleged unrepublican forms. A mere pretence would suffice. Shortly stated: the United States and its departments have no powers under this Article except upon the application of some State of the Union.

The doubts prevailing in 1887 as to the safety of the States against a powerful centralized government emphasize this construction, and the careful safeguards that provide against volunteer "protection" lend strong support.

F. *THE METHOD OF ENFORCEMENT.*

1. BY CONGRESS.

Clearly, this guaranty can only be enforced by the United States, which makes the promise. It is a political obligation.

In the case of new States it has been the practice from the beginning, for Congress to enforce this guaranty by specifically requiring that the Constitution of such State shall be "Republican in form" and "shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence." Such is the established formula.

It is inconceivable that the Congress should be recognized in the enforcement of this guaranty against new States, and not be the power authorized to enforce the guaranty against an existing State.

Congress and the President hold the executive machinery; they alone can employ the army and navy, the arsenals and fortifications, the marshals, the militia, the national treasury; all essential to the enforcement of this contract with the States.

Congress and the President are "the United States" in contemplation of our organic forms.

In Congress all interests are represented when the question of Enforcement arises. The respective States have their representatives there to admit or protest.

2. THE REMEDY IS POSITIVE.

The method of executing a guaranty to a State is not to ignore the State and its regular acts until it gets back to the prescribed forms; a positive remedy is involved in the guaranty; a remedy by restoration not by nullification.

The guaranty contemplates an invasion of "republican forms," duly protested by one of the States. The duty of the United States is then to restore those forms.

Presumably the violation of form must be Constitutional or Statutory, and the duty of the government would be to demand a repeal of such provisions and the enactment of proper forms.

A case in point would be a constitutional recognition of heredity in official tenure. The United States could compel a repeal. A self-perpetuating legislature could be deprived of its powers.

Until, however, the United States intervenes, the ordinary operations of government and laws will be recognized.

The guaranty is not that there shall never be in any State forms which are unrepublican, but that if there be such, then upon proper demand of a State, the required forms will be restored.

3. NULLIFICATION OF EXISTING LAWS NOT THE REMEDY.

There is nothing in this section four which suggests that so long as an unrepublican form is *de facto* recognized in the State itself, the enacted laws and settled Constitution are to be nullified. A status is merely created upon which the State is entitled to resort to the United States for the restoration of republican form; till then neither the United States nor this Court can be required or allowed to decide at what point republican forms become inoperative and to ignore the legislative, executive and judicial products of such irregular machinery. If such were the case all the laws of eight States which have utilized the initiative and referendum would be *prima facie* void. Executive acts and judicial findings involving the initiative and referendum would be illegal. No such wholesale nullification is contemlated in a guaranty.

"Among those matters which are implied, though not expressed, is that the nation may not in the exercise of its powers, prevent a State from discharging the ordinary functions of government."

"The Constitution provides that 'the United States shall guarantee to every State in this Union a Republican form of government.' That expresses the full limit of national control over the internal affairs of a State."

South Carolina *vs.* U. S. 199 U. S. 261.

The guaranty shortly stated is: If the States will enter into this compact and create a centralized power through a

contribution of sovereign power by each and all the States, this United States will not impose upon you any unrepublican forms, and if from any source these forms be imposed upon you, we guarantee to restore them; but it cannot be implied that the United States by any department, will *ex mero motu* or in behalf of a private litigant, ignore all the regular acts of a State government which may, in the judgment of the United States, date from the beginnings of unrepublican forms.

4. THE GUARANTY IS OF "FORM" NOT OF PRACTICE.

Colorado has been recently under martial law; yet the utmost which could be demanded was that the United States by its political instruments, should suppress domestic violence upon the request of the legislature or governor.

Had a dictator assumed tyrannical functions, it is submitted that if the Constitution contained the requisite republican forms, the United States could not be called upon to redeem its guaranty, inasmuch as the requisite forms existed and it only remained for the people to insist upon them. While in so insisting the people may require the protection of the United States under the final clause of Article 4, Section 4, the form alone of lawful government is assured by the first clause; anarchy and other unrepublican conditions are only reachable on the constitutional call of the State for protection against domestic violence. If through the established forms the State asks no redemption of the guaranty, practical anarchy is no concern of the United States and certainly not of this court under the guaranty clause.

A fortiori peaceful behests of the majority in Oregon under forms satisfactory to them must be honored by the United States and this court until the guaranty is duly demanded by a State.

B. *JURISDICTION OF THE COURTS.*

1. STATE COURTS.

The Supreme Court of Oregon has decided that the law of which complaint is here made is constitutional and Appellant is not allowed in this court to question the validity of its State Constitution.

"The Constitution of the United States enumerates specially the cases over which its judiciary is to have cognizance, but nowhere includes controversies between the people of a State as to the formation or change of their Constitutions."

"If it be asked what redress have the people if wronged in these matters, unless by resorting to the judiciary, the answer is, they have the same as in all other political matters. In those they go to the ballot-boxes, to the legislature or executive, for the redress of such grievances as are within the jurisdiction of each, and, for such as are not, to conventions and amendments of the Constitution."

Luther *v.* Borden, 7 How. 54.

It is not denied that the legislature had power to repeal the act of which appellant complains, and that appellant has not secured action from this body, which is still open to it to overturn this enactment.

When called upon to review the legality of legal enactments in Texas, this court expressed itself in language well applicable to the case at bar:

"The State (of Texas) is in full possession of its faculties as a member of the Union, and its legislative, executive and judicial departments are peacefully operating by the ordinary and settled methods prescribed by its fundamental law. Whether certain statutes have or have not binding force, it is for the State to determine, and that determination of itself involves no infraction of the Constitution of the United

States and raises no federal question giving the courts of the United States jurisdiction."

Duncan *v.* McCall, 139 U. S. 449.

2. UNITED STATES COURTS.

"It was long ago settled that the enforcement of this guaranty belonged to the political department."

Taylor *v.* Beckham, 178 U. S. 578.

And the court adds that after appeal to the State tribunals "any remedy is to be found in the august tribunal of the people, which is continually sitting and over whose judgment on the conduct of public functionaries the courts exercise no control."

The opinion of Chief Justice Taney in the case of Luther *v.* Borden, (7 How. 1) is one of the monuments of his masterly ability, and with apparent prescience he has covered the issues of jurisdiction here involved. Should his reasoning in that case be not followed and should this Court declare the Constitution of Oregon invalid as here claimed, the political effects might be even farther reaching than those of this great justice's opinion in the Dred Scot case.

With respect to the enforcement of Art. IV, §4, the Chief Justice says:

"Under this article of the Constitution (Art. IV, § 4) it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the Senators and Representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper Constitutional authority. And

its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal."

"It rested with Congress too to determine upon the means proper to be adopted to fulfill this guarantee. They might, if they had deemed it most advisable to do so, have placed it in the power of a court to decide when a contingency had happened which required the federal government to interfere."

"But, fortunately for our freedom from political excitements in judicial duties, this court can never with propriety be called on officially to be the umpire in questions merely political. The adjustment of these questions belongs to the people and their political representatives, either in the State or general government. These questions relate to matters not to be settled on strict legal principles. They are adjusted rather by inclination—or prejudice or compromise, often. Some of them succeed or are defeated even by public policy alone, or mere naked power, rather than intrinsic right. There being so different tastes as well as opinions in politics, and especially in forming Constitutions, some people prefer foreign models, some domestic, and some neither; while judges, on the contrary, for their guides, have fixed constitutions and laws, given to them by others, and not provided by themselves. And those others are no more Locke than an Abbe Sieyes, but the people. Judges, for Constitutions, must go to the people of their own country, and must merely enforce such as the people themselves, whose judicial servants they are, have been pleased to put into operation." Mr. J. Woodbury (p. 51) *et seq.*

"Another evil, alarming and little foreseen, involved in regarding these as questions for the final arbitrament of judges would be, that in such an event all political privileges and rights would, in a dispute among the people, depend on our decision finally. We would possess the power to decide against as well as for them, and under a prejudiced or arbitrary judiciary the public liberties and popular privileges might thus be much perverted, if not entirely prostrated. But, allowing the

people to make Constitutions and unmake them, allowing their representatives to make laws and unmake them, and without our interference as to their principles or policy in doing it, yet, when Constitutions and laws are made and put in force by others, then the courts, as empowered by the State or the Union, commence their functions and may decide on the rights which conflicting parties can legally set up under them, rather than about their formation itself. Our power begins after their's ends. Constitutions and laws precede the judiciary, and we act only under and after them, and as to disputed rights beneath them, rather than disputed points in making them."

"The disputed rights beneath Constitutions already made are to be governed by precedents, by sound legal principles, by positive legislation, clear contracts, moral duties, and fixed rules; they are *per se* questions of law, and are well suited to the education and habits of the bench. But the other disputed points in making Constitutions, depending often, as before shown, on policy, inclination, popular resolves, and popular will, and arising not in respect to private rights—not what is *meum* and *tuum*—but in relation to politics, they belong to politics, and they are settled by political tribunals, and are too dear to a people bred in the school of Sydney and Russel for them ever to intrust their final decision, when disputed, to a class of men who are so far removed from them as the judiciary; a class, also, who might decide them erroneously as well as right, and if in the former way, the consequences might not be able to be averted except by a revolution, while a wrong decision by a political forum can often be peacefully corrected by new elections or instructions in a single month. And if the people, in the distribution of powers under the Constitution, should ever think of making judges supreme arbiters in political controversies, when not selected by nor, frequently amenable to them, nor at liberty to follow such various considerations in their judgments as belong to mere political questions, they will dethrone themselves and lose one of their own

invaluable birthrights; building up in this way—slowly, but surely—a new sovereign power in the republic, in most respects irresponsible and unchangeable for life, and one more dangerous, in theory at least, than the worst elective oligarchy in the worst of times."

Mr. Justice Swayne, in dealing with the claim that the Constitution of Georgia was adopted under coercion of Congress, says:

"The action of Congress upon the subject cannot be inquired into. The case is clearly one in which the Judicial is bound to follow the action of the Political Department of the Government and is concluded by it."

White *v* Hart, 15 Wall. 646.

This appellant seems to be the only citizen of Oregon, who is agitated by these alleged unrepublican forms.

The Governor and the Legislature of Oregon report no violent interruptions of their duties; the duly constituted courts of the State have peacably dismissed the appellant's complaints; its senators and congressmen attend in the same building with this court; the attorney-general comes here presumably officially representing the people of Oregon and the State of Oregon, and no one asks to overthrow the established and constitutional forms of that State, save this corporation, a creature of the State, whose very life could be lawfully destroyed by the State of Oregon, before its complaint reached this court.

No other State complains that the guaranties of the United States Constitution are violated. No report has come to Congress and the President, who have the armies of the United States at their back, that the republic has ceased in Oregon and must be restored.

It seems imperative that one question should first be considered and answered by this court, viz:

How will the reversal of this judgment guarantee to the State of Oregon a Republican form of government?

Despite this court's decree, the people of Oregon may continue their system, subject only to the inconveniences which attend specific refusals of this court to recognize the initiative laws as valid.

This court can guarantee only that with every opportunity it will declare initiated acts void—but this will not change the form of government of Oregon. This court's only method of guaranteeing a Republican form (as it may construe such form) is by some positive act, such as sending its marshals to enforce an injunction against voting for such laws.

An injunction would hardly operate upon all the voters of a State, and could not prohibit them from voting as they please.

The marshals who alone can enforce this court's decree, are the officers of the political department, appointed by the President. The President might remove them for making such an effort: Congress having recognized this system as Republican, might take away the appellate power of this court to prevent its interference in such cases. Thus the proposition is emphasized, that the guaranty is for enforcement by the political power, which alone possesses the instruments to enforce its orders. This court in plainly not equipped to enforce this guaranty.

H. *EFFECT OF JUDICIAL DECREES.*

1. THE NULLIFICATION OF INITIATED LAWS.

The only operation which a decree of the court could have would be to outlaw the State of Oregon, at least so far as its Constitution, laws and institutions are based upon "initiative" proceedings.

The court could upon any appeal from the courts of Oregon, refuse the enforcement of judgments based upon such enactments. In the eyes of this court such constitutions and laws would be void *ab initio*. If they were not void *ab initio* this appellant has no standing.

The following Constitutional Amendments and Acts were enacted last year at the polls in Oregon on initiative petitions:

Constitutional Amendments.

For the regulation of taxation by counties.

Giving cities and towns power to license or prohibit the sale of liquors.

Providing jury verdicts of three-fourths, separate summonses for grand and petty juries, regulating retrials, fixing terms, increasing jurisdiction of Supreme Court, and fixing tenure of judges.

Extending debt limit for counties for road making purposes.

Acts for

A tax to support a Normal School.

Amendments of Direct Primary law and corrupt-practices' act.

Fixing employers' liability.

Prohibiting taking of fish.

Are these laws organic and functional void *ab initio?* The appellant can only stand upon that ground with respect to the tax imposed upon him.

As a judgment in its favor must be on the ground of the unconstitutionality of the method of making the law, it would require no further judgment of this court to nullify all laws, institutions, taxes, territorial divisions, judicial proceedings, etc., which in ten different States may have been established by this same method.

If the people have no right to propose laws without the intervention of a legislature, it would seem to follow that they cannot alter their constitutions by the same method: the two propositions are inseparable.

2. CONFLICT WITH CONGRESS.

Congress and the President have already after full discussion admitted to the Union the State of Oklahoma and agreed to admit the State of Arizona, under Constitutions containing provisions for the initiative on Constitutional amendments and statutes, which follow almost in exact words the Oregon amendment.

For more than a century this Court has recognized the power of Congress to determine whether the Constitutions of States applying for admission to the Union are republican in form. It cannot be that a different department of the government is to decide upon the republican forms of States already in the Union. The very proposition involves an irrepressible conflict.

Certainly Oklahoma and Arizona have no greater rights in the Union than has the State of Oregon. And if this Court should now declare the Constitution of Oregon to be unrepublican, it cannot avoid a like decree against Oklahoma and Arizona. That Congress would assert its rights and defend with its political power the legality of the Constitutions, which it has expressly approved, is unquestionable. It would likewise extend its protection to Oregon, Maine, Missouri, South Dakota, Nevada, Utah, Montana, Arkansas and California.

If Congress thus recognizes these Constitutions, it is clear that the other States must give full faith and credit to the public acts, records and judicial proceedings of these States, and this Court would be the only tribunal to ignore or deny their Constitutional regularity.

Such a conflict is inconceivable; yet it would be opened if this appellant should prevail.

This Court might impede by its decrees the operations of Statehood, but it is plain that only Congress could enforce the guaranty to which the United States has pledged itself.

(As to the proceedings for the admission of Oklahoma and Arizona, see *infra* III B, 2, a. and b.)

Chief Justice Taney in Luther *v.* Borden gave the logical forecast of such a conflict between the judicial and political departments in these words:

"After the President has acted and called out the militia, is a Circuit Court of the United States authorized to inquire whether his decision was right? Could the Court, while the parties were actually contending in arms for the possession of the government, call witnesses before it and inquire which party represented a majority of the people? If it could, then it would become the duty of the Court (provided it came to the conclusion that the President had decided incorrectly) to discharge those who were arrested or detained by the troops in the service of the United States or the government, which the President was endeavoring to maintain. If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, and not of order."

III. The Basis of Construction and Interpretation.

A. *THE GENERAL RULES.*

It is submitted that in construing and interpreting Art. IV, § 4 there must be a material departure from the rules ordinarily applied to the Constitution of the United States.

National powers were acquired by delegation of sovereignty from the people of the States. When the limits of these powers are in question it is a proper and necessary inquiry what the people of the then existing States intended to delegate to the United States. The national powers cannot be extended beyond what were then intended to be conveyed. Hence the minute inquiry into the interpretation then put upon the Constitution. It would seem that even in this inquiry the opinions of those who comprised the convention, which framed the Constitution, are given too much weight,

inasmuch as the meetings were secret and these opinions were not known to the people. The debates before the people and in the ratifying conventions would seem to be entitled to greater weight, as they may be taken to have fairly expressed the opinions of the people whose consent gave effect to the instrument.

But we deal now with a different case, viz., a provision of guaranty, which is for the benefit of the States and in which the States, not the United States, are the interested parties. The guaranty was not designed to deprive the States of any sovereign powers not expressly delegated in the national constitution, and the IX. and X. amendments emphasized this fact.

Hence, not only, as has been heretofore submitted, are the States alone entitled to call for the enforcement of the guaranty, but the prevailing opinions of the States become of dominating importance in determining what is a "republican form." If the States are content with the present forms of the State governments there can be no call for the guaranty.

Hence it is submitted that present public opinion is the foremost test in construing this guaranty.

Next in importance seem to be the precedents established by Congress, which is invested with power to admit new States, and therefore from time to time establishes the forms, which, like those of the original states, cannot be impeached.

Any opinions of the courts not in conflict with the above two standards should next be considered.

But there are also, it is submitted, certain irrevocable standards of the past, which even present opinion cannot exclude.

First among these are the forms of free government which were known to the Colonists, when they were permitted to exercise sovereignty. Any free forms practiced by the Colonists cannot be excluded from the category of "Republican forms."

The second irrevocable standard must include any form, which was recognized as Republican, when the Constitution was framed. So far as there was agreement upon fundamental principles, we must accept any forms which, within the fundamental

principles were comprehended in the extremes of opinion of that day. As Hamilton and Jefferson agreed that popular sovereignty must always be maintained, any "form" which was within the purview of the schools they represented must be accepted as "Republican."

Next in importance would seem to be the popular judgment in 1887.

Finally would come the secret statements in the Constitutional Convention.

These then are the standards of Construction, suggested, in the order of relative importance.

1st Present public opinion.
2d Congressional precedents.
3d Opinions of the courts.
4th Historic Democratic Forms.
5th Extremes in contemporaneous opinion.
6th Public opinion in 1887.
7th Statements in Constitutional Convention.

Hence consideration is asked to

B. *THE STANDARDS BY WHICH THE GUARANTY IS TO BE CONSTRUED.*

1. PRESENT PUBLIC OPINION.

The views above expressed as to the primary importance of present public opinion are the justification for the full statement made above (under I, B and C) of the present status of the Initiative and Referendum in the various States. It may be assumed that "whatever is" is at least intended to be Republican, as the standards of liberty have not been lowered in

the last century. This basis of construction is suggested by the expressions of Mr. Justice Holmes in his dissenting opinion in

Opinions of the Justices, 160 Mass. 587.

"— in construing the Constitution we should remember that it is a frame of government for men of opposite opinions and for the future, and therefore not hastily import into it our own views or unexpressed limitations derived merely from the practice of the past."

Thomas Jefferson said of Constitutional changes (Works, Vol. VII, p. 14):

"Forty years of experience in government is worth a century of book reading—

I know also that laws and institutions must go hand in hand with the progress of the human mind. As—manners and opinions change with the change of circumstances, institutions must advance also and keep pace with the times."

The sovereignty of the people found expression in Lincoln's first inaugural address:

"This country with its institutions belongs to the people who inhabit it."

In Martin *v* Hunter's Lessee, 1 Wheat. 327., the court says:

"It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter (U. S. Constitution), and restrictions and specifications which at the present, might seem salutary, might in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms."

Of all the terms used in the Constitution "Republican form of government" is the most general.

It swept into meaning and significance all the free forms of the past, the then existing conceptions, and the possible develop-

ments in free government for generations, perhaps centuries, to come. The term has, and was intended to have, infinite elasticity.

James Wilson of Pennsylvania, was the greatest Republican in the Constitutional Convention. As a Justice of this court he gave a definition of Republican government, which was good for that day and will remain good to the end of time:

"My short definition of such a government is one constructed on this principle, that the Supreme power lies in the body of the people."

Chisholm *v* Georgia, 2 Dall. 457.

Within this circle of popular sovereignty forms may revolve, cross, intertwine, shift, live and die. It excludes absolutely the idea that forms are confined to those which existed when the Constitution was framed.

Little was then known of popular government save in the memory of early colonial days, in the revolutionary fabrics of the States and the tottering Confederation.

The States had just formed their Constitutions, and free governments had not existed in the colonies since the Stuarts had committed them to the control of the privy council near the end of the 17th century. The only original conception which the revolution created was that of the sovereignty of the people. The framers of constitutions had fluctuated between royalty and Democracy: there were Hamiltons and Jeffersons. The republic was an experiment; doubts applied to every feature of the new forms. It was the uncertainty of infancy, which only age and experience could abate. To say that these experimenters with newly formed ideas were to determine for all time what constituted a republican form, would be to bind posterity to the crude notions of republican childhood.

When the secret ballot has been discovered as the true record of a nation's will must we be limited in its use to the

notions of our ancestors to whom the ballot was an untried tool?

Are the experiences of a simple colonial yeomanry to guage our armament against giant monopolies and legislative corruption?

The railroad, telegraph and telephone have multiplied a hundred fold the possibilities of Democratic co-operation.

The daily press and multitudinous magazines of to-day cannot take the same place in our horizon with the scattered pamphlets of the revolutionary period.

It would be a block in the way of human progress if this court should plant itself upon the conditions and conceptions of our forefathers in the constitutional conventions, and say to each of 46 sovereign States "Thus far shalt thou go and no farther."

The Constitution of Oregon embodies the progress and development of our institutions; it is the first working model of an ideal form in which "the supreme power lies in the body of the people."

2. CONGRESSIONAL PRECEDENTS.

Should this Court undertake to declare invalid the terms of the Oregon initiative amendment, there will be established two different standards of Republican government: one will have the sanction of the Congress and President, the other of this Court. Under its recognized power Congress has admitted Oklahoma to this Union and given its consent to the admission of Arizona.

These two States have in their Constitutions, almost in the same words, the initiative and referendum forms of Oregon. It is not a parallel, it is an essential identity. (See ex parte Wagner, 21 Ok. 35). It is submitted that such action of the political power is determinative of this case.

a. *ADMISSION OF OKLAHOMA.*

The enabling act of Congress for the admission of Oklahoma (U. S. S. at Large, Ch. 3335; Act June 16th, 1906).

§ 34—Provides for submission of the Constitution to the people. "And if the Constitution and government of said proposed State are Republican in form &c., it shall be the duty of the President of the United States"—to issue his Proclamation announcing the result of said election and thereupon the proposed State of Oklahoma shall be deemed admitted by Congress into the Union, &c.

The Congressional Record teems with attacks and defences of these Direct Legislation provisions and the decision of Congress was made deliberately in their favor. It is matter of notoriety that in the year following there was much doubt expressed as to the acceptance of the Constitution by President Roosevelt. Mr. Taft, then Secretary of War, was supposed to have been the representative of the President in addressing the people of Oklahoma and criticising the provisions for the Initiative and Referendum. That the people of Oklahoma had strong reasons to believe that their Constitutional provisions would meet with executive opposition, appears in the opinion of C. J. Williams in Ex parte Wagner, 21 Ok. 35.

The Court thus explains the history of the omission of the self-executing clause of the direct-legislation provisions in the Oregon Constitution.

"Such self-executing provisions were in the original form which was provided to be submitted to the people; but the convention reassembled "in order to obviate any possible objection that might be made by the President of the United States to the same, wherein it was required by §4, Art. IV, Constitution of the United States and the terms of the enabling act to be Republican in form, and not in conflict with the provisions of said act, that part was eliminated, leaving it to the legislature to

carry same into effect. Until the legislature created measures carrying it into effect, the Federal government had less right or reason to complain."

The decision was deliberately and finally made as follows:

By proclamation (U. S. St. at Large, Vol. 35, pt. 2, p. 2160), Nov. 16, 1907, President T. Roosevelt declared that the Constitution adopted by the people had been certified to him "And whereas it appears that the said Constitution and government of the proposed State of Oklahoma *are republican in form*, &c., and said Constitution" is not repugnant to the Constitution of the United States or to the principles of the Declaration of Independence, &c. "the State of Oklahoma is to be deemed admitted by Congress into the Union under and by virtue of the said Act (June 16th, 1906) on an equal footing with the original States."

Signed "By the President, Elihu Root,
Secretary of State."

b. *ADMISSION OF ARIZONA.*

The enabling act for the admission of Arizona (U. S. S. at Large, Ch. 310, June 20, 1910) provided

§20.—"The Constitution shall be *Republican in form* and make no distinction in civil or political rights on account of race or color and shall not be repugnant to the Constitution of the United States and the *principles of the Declaration of Independence.*"

Congress provided for definite limitations upon the future powers of Constitutional amendment, "by an ordinance irrevocable without the consent of the United States and the people of said States" touching religious freedom, polygamous marriages, sale of liquor to Indians, disclaimers to public lands, equality of taxation, taxing Indian lands, assumption of territorial

debts, public schools, right of suffrage, &c.—which shall be made part of such Constitution in terms to preclude later amendment "without the consent of Congress."

It was open to Congress to make like reservation with respect to amendment striking out direct legislation, but it was not done.

By these reservations it appears also that this Constitutional contract with the U. S. was to be made with Congress, showing that the political power is recognized in the execution of such agreements.

The same act

§ 21 (Ch. 310, 1910) provides for submission of the Constitution proposed by the State convention to the people.

§ 22. "And if Congress and the President approve said Constitution the President shall certify said facts to the governor," &c.

§ 23. On election of State officers the President shall "issue his proclamation" and thereupon "the proposed State of Arizona shall be deemed admitted by Congress into the Union by virtue of this act on an equal footing with the other States."

The debates in Congress show that Congressional opposition to direct legislation had practically ceased.

It is public knowledge that the veto of the President was confined to the "recall" provisions of the Constitution and following this veto Congress amended the terms of admission by act approved Aug. 21st, 1911 so that "Arizona is admitted as a state upon amending the proposed Constitution (Art. VIII, § 1) adopted by the electors at the election held Feb. 9, 1911—so as to except members of the judiciary from the *recall* provision."

c. *THE REAPPORTIONMENT ACT.*

But an act of Congress of even greater significance has recognized the legal status of those State Constitutions, which contain provisions for direct action by the people under the Initiative and Referendum.

House Report No. 2983, 1911, provided for the redistricting of States for representation in Congress by customary legislative acts. This bill was amended in the Senate, Aug. 3d, 1911, and became a law in the following form (Acts Aug. 8th, 1911.)

"§34. That in case of an increase in the number of Representatives in any State under this apportionment such additional Representative or Representatives shall be elected by the State at large and the other representatives by the districts now prescribed by law until such State shall be *redistricted in the manner provided by the laws thereof*, &c."

This amendment was expressly intended to leave the redistricting subject to the Initiative and Referendum in States where they have been adopted.

Thus provisions for direct legislation have become a part of the political system of the United States, and the legality of future Congresses may be dependent upon a like recognition by this court.

3. OPINIONS OF THE COURTS.

This Court has in a sweeping statement confirmed the title of the people of Oregon to shape its government to their own free will:

"The powers of the States depend upon their own Constitutions: and the people of every State had the right to modify and restrain them, according to their own views of policy or principle."

Martin *v* Hunter's Lessee, 1 Wheat. 305.

The Supreme Courts of Oklahoma and Oregon have affirmed the validity of Direct Legislation in ex parte Wagner, 21 Ok. 35, and

Kadderly *v* Portland, 44 Oregon 118.

In the latter case Justice King for the Court erected an impregnable standard for the Republican form:

——"each republic may differ in its political system, or in the *political machinery* by which it moves, but so long as the ultimate control of its officials and affairs of State remains in its citizens it will in the eye of all republics, be recognized as a government of that class."

Kiernan *v* Portland, 111 Pac. Rep. 379.

So the Minnesota Supreme Court holds

"The test of Republican or Democratic government is the will of the people, expressed in majorities under the proper forms of law."

See also Hopkins *v* Duluth, 81 Minn. 189.
See also In re Pfahler, 150 Cal. 77.

Much reliance has been placed by opponents of direct legislation on the case of

Rice *v* Foster, 4 Harr. 479,

which contains language unworthy of an American Court and has very properly come under severe criticism.

Mr. Justice Holmes, in the opinions of the Justices, 160 Mass. 587, refers to the theory of Hobbes that the surrender of sovereignty by the people was final, and calls attention to the fact that the notion of Hobbes was urged in the interest of the absolute power of King Charles I., and thus disposes of the case of Rice *v* Foster:

"I notice that the case from which most of the reasoning against the power of the legislature has been taken by later decisions states that theory from language which almost is borrowed from the Leviathan."

4. HISTORIC DEMOCRATIC FORMS.

It must be that in using the general term "Republican Form of Government," it was intended to include beyond peradventure such preceding free forms as were known to the people of the States when they adopted the Constitution. Such indeed furnished the only basis upon which the people could construe the term. If such precedents were to be excluded the submission of the constitution to the people was in this regard a snare.

Hume, Rousseau, Locke and Kant had then spread the doctrine of popular sovereignty through the world, and their works and theories were well known to the colonists. Paine and Jefferson were expounders of this doctrine in America. Locke had attempted to put his theories into concrete form in the charter for Carolina. Rousseau's "Social Contract" was already imbedded in words in the Massachusetts Constitution. He had definitely challenged the representative system (Ch. XV.) in the words:

"Every law which the people in person have not ratified is invalid."

From these writers the Colonists had absorbed the extreme ideas of Democracy. Democracy flowed in their Teutonic blood, was imbedded in their town and colonial governments, and was the hope and inspiration of their revolutionary struggle.

"Representatives," "delegates," meant to them rulers and not servants. Their numerous democracies in the shape of towns had not in a century and a half yielded up even to the argument of force one jot of their purity. They exist to-day as lasting monuments of the truth, that the ultimate destiny of human freedom is pure Democracy, the direct expression of the popular will in the exercise of sovereignty.

Democracy, and not a representative system, was the ideal of the colonists.

A. *TEUTONIC ORIGINS.*

"The political instincts of a race have their origin in a prehistoric age." In their "force and persistence we discern—the tendency displayed in kindred nations to preserve in their governments the essential features of the primitive political institutions of the race to which they belong."

Stevens Sources of Const. of U. S., p. 3.

Nothing in history has proved its vitality more definitely than the Teutonic idea of direct popular government. It survived the Roman influences in Switzerland, and in England the Norman conquest. It is embedded in Magna Charta, in the English vestry and county, and on the new soil of America burst forth in its primitive purity and strength. Where this idea has held its force, freedom to-day appears in most perfect form; in Switzerland the volkmoot of Uri, Schwiz and Unterwalden has found expression in the Cantonal and Federal Constitutions; in England it is now asserting its dominion over feudal privileges in the deposal of the House of Lords and the destruction of land monopoly; in Australia and New Zealand popular government has taken on progressive forms, and Canada is advancing in like direction. In the United States it asserts itself over the mixed bloods and imported citizenship. As between the upper and the nether millstone it grinds all races into food for liberty, and now before this Court asks recognition of the final step in asserting the sovereignty of the people.

Back in the earliest records of Teutonic practices we find pure democracy, changed only in form of expression by the Constitution of Oregon.

Tacitus ("Manners of the Germans," § XI) describes the political gatherings of the ancient Teutons:

"No man dictates to the assembly; he may persuade but cannot command. When anything is advanced not agree-

able to the people, they reject it with a general murmur. If the proposition pleases, they brandish their javelins."

The historian McCracken (History of Switzerland, p. 35) expresses surprise "that it has escaped notice of historians that through Alamannian invasion of Helvetia and Great Britain by Saxon and English tribes, Switzerland and England (and her colonies!) have retained Teutonic institutions in greater purity than all the other States founded by Teutonic races."

"The first Swiss confederation entered history in 1291 when the small peasant communities, Uri, Schwiz and Unterwalden concluded a pact to defend themselves against the encroachments of the nobility." (McCracken, p. 6.)

These communities were pure democracies, and at the present day they retain the Landes gemeinde (popular assembly) as their legislative body, in form unchanged from the earliest days of their recorded history.

Kemble (Saxons in England, 236, 237) remarks:

"The Teutons certainly did not elect their representatives as we elect ours (in England) with full power to judge, decide for, and bind us, and therefore it was right and necessary that the laws, when made, should be duly ratified and accepted by all the people."

So—"The whole principle of Teutonic legislation is, and always was, that the law is made by the Constitution of the King and the consent of the people; and —one way in which that consent was obtained was by sending the capitula down into the provinces and shires and taking the 'wed' (pledge) —in the shire moot."

The original form of government in Saxon England was the Folksmoot (assembly of the people) and it was only under the stress of wars and the aggregation of the petty kingdoms or shires into the great heptarchic kingdoms, that the Folksmoot gave way to the Witangemot in the nation and survived only in the shires.

Kemble (Saxons in England, II, pp. 191–194) points out how impossible it was for the whole of a large people to attend upon the meetings, leaving their farms, while the leaders could easily do so, following the King. "Thus it appears to me by a natural process did the Folksmoot, or meeting of the nation become converted into a Witangemot or meeting of councillors."

History records the survival of democratic forms in England which filled the minds of the puritans, who left their native land and sought on inhospitable soil, the right to govern themselves according to their free will. They knew the parish had never ceased to be democratic: John Calvin had filled their minds with the doctrine of common consent, and the covenants of the people in England, Scotland and Ireland were the exemplars from which the Pilgrims formed their Mayflower compact of self-government. The Guilds were democratic in their form and administration, and the church congregations were miniature republics.

But these conditions in the mother country cannot be extended here.

Consult Kemble, Saxons in England; Stubbs, Constitutional History of England; Freeman, Growth of the English Constitution; Campbell (Douglas) Puritan in Holland, England and America; Hosmer, Anglo Saxon Freedom; Prof. Vincent, Government in Switzerland; Lowell, Governments and Parties in Continental Europe; Taylor, Constitutional History of England.

B. *COLONIAL PRECEDENTS.*

The Colonial Charters conferred in most instances Democratic powers. Even the proprietary governments had such form.

Carolina was invested with powers of government "with the assent, advice and approbation of the freemen of the Colony."

In Maryland's charter to Lord Baltimore a like provision was made, and later fundamental law gave power to the legislative assembly "as if the freemen were personally present."

William Penn was invested with powers of government "with the advice and assent of the freemen."

In the first year of the government devised by him "the general assembly was to consist of the whole number of freemen."

Pitkin's History of United States, pp. 57, 55, 56, 65, 16.

1. NEW HAMPSHIRE.

Albert S. Batchellor (Government and Laws before the Establishment of the Province) states that the grants to John Mason by the Council for New England (pp. 16, 17) included the towns of Exeter, Portsmouth and Dover, which were not only governed by direct vote of the people, but the first union of these towns (1637) under the name of "combination for local government," was upon the Democratic method (p. 23), and existed until the compact of union with Mass. Bay, 1641 (p. 23).

2. MASSACHUSETTS BAY.

The grant of the Council for New England of 1627–8, to John Endicott and five others was enlarged by the royal charter of 1629–30 to the Governor and Company of the Mass. Bay in New England."

The whole body of freemen was empowered to elect the officers and it was "by the general vote of the people and the erection of hands" that the law making power was (Oct. 19, 1630) first conferred upon the officers elected.

While the people of this Colony adopted the delegate system earlier than those of New Plymouth, the actions of the General Court were regulated upon purely Democratic lines until 1643 when the New England Confederation was formed.

The initiative of laws by a standing committee was provided in 1638 that their work might "bee psented to the Generall Court for confirmation or reiection, as the Court shall adjudge."

(Records of Mass. Bay, Shurtleff's Ed. page 22.)

Attendance of the freemen at the General Court was compulsory, but by enactment of the general court in 1635 (records of Mass. Bay, page 166) "the towns of Ipswch, Neweberry, Salem, Saugus, Waymothe and Hingham shall have libertie to stay soe many of their ffreemen att home, for their safety of the towne, as they judge needefull, & that the saide ffreemen that are appoyncted by the towne to stay att home shall have liberty for this Court to send their voices by pxy."

3. PLYMOUTH COLONY.

The Plymouth Compact was made Nov. 11, 1620, and is a covenant of Democracy:

"We—do—covenant and combine ourselves together into a civic body politick, for our better ordering and preservation and furtherance of the ends aforesaid: and by virtue hereof, do enact, constitute and frame such just and equal laws, ordinances, acts, constitutions and officers, from time to time, as shall be thought most meet and convenient for the general good of the colony; into which we promise all due submission and obedience." Signed by 41.

The Compact, Charter and Laws of the Colony of New Plymouth (1836), p. 19.

The first laws of the Colony of New Plymouth were made in 1623 (p. 28) in full court (p. 29).

The act of January, 1632 begins: "It was enacted by public consent of the freemen of this society of New Plymouth, etc." (p. 30).

A form of government adopted Nov. 15, 1636, recited that "No imposicon law or ordnance be made or imposed upon or by ourselves or others at present or to come but such as shall be made or imposed by consent according to the free liberties of the State and Kingdome of England and no otherwise" (p. 36). The election of governor and seven assistants was "to be made only by the freemen according to the former custome" (p. 37). As to laws "that the lawes and ordnances of the Colony and for

the government of the same be made onely by the freemen of the corporation and no other" (p. 42).

It was at a general meeting of freemen that in 1638 (p. 63) it was enacted as follows:

"Whereas complaint was made that the freemen were put to many inconveniences and great expences by their continuall attendance at the Courts, it is therefore enacted by the Court for the ease of the severall Colonies and Townes within the government, That every Towne shall make choyce of two of their freemen and the town of Plymouth of foure, to be Committees or deputies to joyne with the Bench to enact and make all such lawes and ordinances as shall be judged to be good and wholesome for the whole, provided that the lawes they doe enact shall be propounded one Court to be considered upon till the next Court, and then to be confirmed, if they shal be approved of *except the case require present confirmacon*. And if any act shall be confirmed by the Bench and Committees which upon further deliberacon shall prove prejudiciall to the whole, That the freemen at the next Eleccon Court after meeting together *may repeale the same and enact any other usefull for the whole*." (Here is emergency legislation and the referendum and initiative retained in the body of the freemen).

In 1646 it was Enacted by the Court:

"Whereas the Townes formerly were to send their deputies (which must arise out of their freemen) to attend the three Generall Courts of the yeare, for our Soveraigne Lord the Kinge, now upon the speciall complainte of the deputies of the Townes so sent professinge them to be oppressed thereby, it is ordered and enacted that the whole body of freemen appeare at the Election Courte, which is the first Tuesday in June successively, and there to make or repeale such lawes orders and ordinances as shall be founde meete and wholesome for the orderinge of the government, and that then alsoe they present such deputies as have bene chosen by their townes accordinge to order formerly established who are to attend the same, and its severall

adjournments as the occasions of the Country shall require, and that whatsoever lawes orders and ordinances shall be made or repealed be at that Courte and the severall adjournments thereof onely done and the other Courts to attend onely matters of Judicature and the magistrates onely to attend the same." p. 88.

Apparently the delegation of legislative powers had proved unsatisfactory and thereupon such powers were withdrawn from the deputy courts and the enactment of laws was restored exclusively to the whole body of the freemen at the election Court in June. The first experiment in delegation of legislation was a failure.

1658 the laws of the Colony were revised and published. The revision begins (p. 107):

"Wee the Associates of New Plymouth coming hither as freeborne subjects of the state of England indowed with all and singulare the privilidges belonging to such being assembled doe ordaine constitute and enacte that noe acte imposition law or ordinance bee made or imposed upon us att prsent or to come but such as shal bee made and imposed by consent of the body of the Associates or theire Representatives legally assembled, which is according to the free libertie of the State of England."

The same clause was enacted in general laws 1671 (p. 241)

4. RHODE ISLAND.

The early life of the colonists of Rhode Island was under a pure democracy. The colonists of Providence in 1636 (records of the Colony of Rhode Island, Vol. 1, page 14) declared their obedience "to all such orders or agreements as shall be made for public good of the body in an orderly way by the major consent of the present inhabitants, masters of families incorporated together in a towne fellowship and others whom they shall admit unto them only in civil things."

The town of Portsmouth in 1638 by compact underwritten by the inhabitants (records of the Colony of Rhode Island,

Vol. 1, page 52) submitted themselves "to the King of Kings and Lord of Lords and to all those perfect and most absolute lawes of his given us in his holy word of truth, to be guided and judged thereby."

Not only were the freemen of Portsmouth the makers of the laws but (Records of the Colony of Rhode Island, Vol. 1, 57) penalties were imposed upon those who "shall not repair to the publick meetings to treate upon the publick affairs of the Body upon publick warning (Whether by beate of the Drumm or otherwise) if they fayle one quarter of an houre after the second sound, they shall forfeit twelve pence; or if they depart without leave they are to forfeit the same summ of twelve pence."

Not only did the towns of Rhode Island thus independently practice a democratic system but a general court, legislated for the united towns of Newport and Portsmouth and in 1641 (Records of the Colony of Rhode Island, Vol. 1, page 112) a democracy was declared in the following words:

"It is ordered and unanimously agreed upon, that the Government which this Bodie Politick doth attend unto in this Island, and the Jurisdiction thereof, in favor of our Prince, is a *Democracie* or Popular Government; that is to say, It is in the Powre of the Body of Freemen, orderly assembled or the major part of them, to make or constitute Just Lawes, by which they will be regulated, and to depute from among themselves such Ministers as shall see them faithfully executed between Man and Man."

Thus we have independent compact of the towns united in a purely democratic system recognizing only laws made by themselves based upon "the holy word of truth."

Not until 1643 (Records of the Colony of Rhode Island, Vol. 1, 143) was the charter of the Colony of Rhode Island granted bearing the name of "The Incorporation of Providence Plantations in the Narragansett Bay in New England."

This was a democratic charter giving to the inhabitants (Records of the Colony of Rhode Island, Vol. 1, p. 146) "full power and authority to rule themselves, and such others as shall hereafter inhabit within any part of the said tract of land by such a form of Civil Government *as by voluntary consent of all, or the greater part of them*, they shall find most suitable to their estate and condition."

Under the terms of this instrument, the people of Providence, Newport, Warwick and Portsmouth met in "general court" in May 19th, 1647. They proceeded to enact a perfect form of the initiative and referendum in the following remarkable terms (Records of the Colony of Rhode Island, Vol. 1, 148, 149).

"II. It is ordered, that all cases presented, concerning General Matters for the Colony, shall be first stated in the Townes, Vigd't, That is when a case is propounded . . . The Towne where it is propounded shall agitate and fully disscus the matter in their Towne Meetings and conclude by Vote; and then shall the Recorder of the Towne, or Towne Clerke, send a coppy of the agreement to every of the other three Townes, who shall agitate the case likewise in each Towne and vote it and collect the votes. Then shall they commend it to the Committee for the General Courte (then a meeting called), who being assembled and finding the Major parte of the Colonie concurring in the case, it shall stand for a Law till the next Generall Assembly of all the people, then and there to be considered whether any longer to stand, yea or no: Further it is agreed, that six men of each Towne shall be the number of the Committee premised, and to be freely chosen. And further it is agreed, that when the General Courte thus assembled shall determine the cases before hand thus presented. It shall also be lawful for the said General Court, and hereby are they authorized, that if unto them or any of them some case or cases shall be presented that may be deemed necessary for the public weale and good of the whole, they shall fully debate,

discuss and determine ye matter among themselves; and then shall each Committee returning to their Towne declare what they have done in the case or cases premised. The Townes then debating and concluding the votes shall be collected and sealed up, and then by the Towne Clarke of each Towne shall be sent with speed to the General Recorder, who, in the presence of the President shall open the vote: and if the major vote determine the case, it shall stand as a Law till the next General Assemblie then or there to be confirmed or nullified."

Historians (see remarks of Amasa M. Eaton, Harvard Law Review, XIII, 584, Arnold, History of Rhode Island, Vol. 1, pp. 203–204) regard this act as a genuine instance of the popular initiative and referendum.

In 1650 the general court gave its powers to a representative committee consisting of 6 from each town, (Records of the Colony of Rhode Island, Vol. 1, pp. 228, 229) and provided for the popular ratification of laws enacted by such committee by the sending of the same to the towns taking their vote thereon which, if unfavorable, should nullify such laws. This was the compulsory referendum in its purest form.

A similar referendum appears in (Records of the Colony of Rhode Island, Vol. 1, pp. 401, 402) and by later provision of the general court, (Records of the Colony of Rhode Island, Vol. 1, page 429,) the majority votes of the entire colony were required for the approval or disapproval of the law instead of the majority of those in each town.

In 1760, the Colony of Rhode Island was a pure democracy in the ancient form of a Folkmoot in which all the public freemen voted.

5. CONNECTICUT.

The settlement of Connecticut was occasioned by the dissatisfaction of certain colonists with their share in the government of the colony of Massachusetts Bay and in 1636 the inhabitants of three towns, (Johnston, History of Connecticut,

pp. 24, 25) migrated in order that they might enjoy a larger liberty in civil affairs.

(See Lobingier, The People's Law, McMillan, 1909 which work contains a comprehensive and able analysis of the democratic institutions of the United States.)

It has been claimed by the historian, Alexander Johnston that "the birthplace of American Democracy is Hartford," (Johnston's Conn. preface p. VIII).

Three years after their settlement, the inhabitants of Windsor, Wetherford and Hartford met in mass convention and formed "one Publike State or Comonwelth". (Colonial Records of Conn. Trumbull's Ed. p. 21).

The agreement is known as the "Fundamental Orders" of 1639. It has been called and is perhaps entitled to be called the first written constitution known in history and is certainly the first which represents the idea of the sovereignty of the people.

Lobingier, p. 90.
Fiske, Civil Government, 192
Johnston, Conn. 63.

The instrument was adopted by the entire body of the freemen and no longer contained any appeal to the sovereign in its enacting clause, but was a direct announcement from the people, "it is ordered, sentenced and decreed."

This instrument had been previously prepared and was adopted as prepared and therefore contains the two essentials of modern constitution making, namely, the preparation of a draft and the popular ratification. Likewise when this instrument was amended, the ratification by the people was required. (Colonial Records of Conn., Vol. 1, p. 140 and 347).

6. THE TOWNSHIPS.

From the landing of the Pilgrims to the time of the Constitutional convention, the town meeting was the unit of popular action in New England. It was the purest form of Democracy,

and was never abandoned except when larger growth compelled a delegate form for cities. The Colonies were obliged to yield to this necessity, but their constituent towns were enduring democracies. Plymouth town has not for a year yielded up this form and the same is true of all other towns to this day. When the Constitution was framed the towns elected the delegates to the ratifying conventions and in numerous cases instructed them as to their action. Lobingier, Peoples Law, p. 188 and 189.

Many towns framed amendments upon which their delegates were to insist.

The towns of New England were as distinct entities within their colonies and States, as were the States under the Confederation and Constitution.

The Stuart ministries were able to impose their governors upon the Colonies as Federalized governments, but as has been well stated the latter "in respect to their municipal rights and privileges were so strongly intrenched in the New England town system that they were practically impregnable." Batchellor, Government and Laws of New Hampshire, p. 36.

From the date of the new Charter (1671) to the Declaration of Independence the law-making power of the Colonies was limited, and the only autonomy was in the towns. As revolutionary States the Colonies of New England were aggregated towns, pure democracies, the real seat of government.

In Massachusetts the Township has always been a political unit, endowed with legislative powers.

By act of the general court of Massachusetts Bay, 1636, it was ordered that "the freemen of every town or a major portion of them . . . make such laws and constitutions as concern the welfare of their town . . . not of a criminal but of a prudential nature."

The call for the convention to frame the Constitution of Massachusetts was issued upon returns from the towns demanding a convention; the towns were requested to send dele-

gates and such constitution was not to be promulgated until the instrument was laid before the "respective towns and plantations" for approval or disapproval by two-thirds of the citizens. Journal of Convention, p. 5, 1779.

The Democratic towns thus took the initiative in the framing of the constitution and held control through the right of ratification.

Such were the Democratic institutions which were cherished in the memory of the Colonists.

When they by violence shook off the Soveignty of the King these were the traditional forms. It is inconceivable that in forming their States and a National Constitution these were not the most precious shapes of government, which they contemplated and which they wished to perpetuate in their exercise of sovereign power.

5. EXTREMES IN CONTEMPORANEOUS OPINION.

The importance of public opinion in the construction of the National Constitution is apparent when we consider that Alexander Hamilton took but small part in the Constitutional Convention, and Jefferson was not a member. Samuel Adams, John Adams, Patrick Henry and other great patriots were not in the convention.

It was indeed in the debates on ratification and in contemporaneous discussions that the real test of popular opinion is to be found. Jefferson and Adams objected that the rights of the people had not been sufficiently guarded, and the ten articles of amendment served as a rebuke to the indifference of the National Convention as to fundamental popular rights.

The two great men, who were then and are now recognized as the leaders of the two extremes of political opinion, were Hamilton and Jefferson, Federalist and Republican.

They agreed as to one fundamental proposition, viz.: that popular sovereighty was the basis of free government. In

sympathies Hamilton was a monarchist, but he acknowledged the principles of the Declaration of Independence.

As to the question of the Republican form there was a wide divergence between Hamilton and Jefferson, but it is submitted that they fully represented the current extremes of opinion among the citizens who ratified the Constitution.

Their extreme interpretations of "republican form" may be accepted as including the entire contemporaneous interpretation, and no form between these extremes should be excluded in the present construction of the "republican form" which was guaranteed to the States.

Hamilton declared that "as long as offices are open to all men and no constitutional rank is established, it is pure republicanism." (Works, Vol. 2, page 416).

Also, "after all we must submit to this idea, that the true principle of the Republic is that the people should choose whom they please to govern them; representation is imperfect in proportion as the current of popular favor is checked." (Works, Vol. 2, page 44).

Hamilton went so far as to declare, "A reunion with Great Britain not impossible with the son of the present monarch in supreme government of this country." (Works, Vol. 2, page 421).

His conception of a republic was contained in the plan which he had prepared for the constitutional convention. (Works, Vol. 2, page 407; Elliot's Debates, Vol. 5, page 584.

This plan provided that the Governor of each State should be appointed under the authority of the United States, and that he should have the right to negative all laws about to be passed in the State. He proposed a Senate selected by electors of the several States who must be free-holders and should hold their offices during good behavior. The President was to be selected by electors chosen by free-holding citizens of each State and he should hold his office during good behavior. The justices of the Supreme Court were to hold by like tenure

together with all other judges. The House of Assembly contained the only officials who, according to his plan, had less than a life tenure based upon good behavior. He provided for the power of impeachment and regarded this, together with the original consent of the people to their constitution, as providing a complete basis of popular sovereignty.

Jefferson's conception of a republic is contained in his letter to John Taylor of May 28th, 1816. (Works, Vol. 6, page 605).

"The term *republic* is of very vague application in every language. Witness the self-styled republics of Holland, Switzerland, Genoa, Venice, Poland.

Were I to assign to this term a precise and definite idea, I would say purely and simply, it means a government by its citizens in mass, acting directly and personally, according to rules established by the majority, and that every other government is more or less republican, in proportion as it has in its composition more or less of this ingredient of the direct action of its citizens.

Such a government is evidently restrained to very narrow limits of space and population. I doubt if it would be practicable beyond the extent of a New England township. The *first shade from this pure element*, which, like pure vital air, cannot sustain life of itself, would be where the powers of the government, being divided, should be exercised each by representatives chosen either *pro hac vice*, or for such short terms as should render secure the duty of expressing the will of their constituents. This I should consider as the *nearest approach* to a pure republic, which is practicable on a large scale of country or population.

The further the *departure from direct and constant control by the citizens*, the less has the government of the ingredient of republicanism."

Hamilton would have accepted a monarch, and while he accepted also popular government as a necessity, he described

it as "but pork still with a little change of sauce." Jefferson detested monarchy, insisted upon pure democratic forms as ideal, and regarded even representatives as "a shade from the pure element."

Hamilton's conceptions prevailed in the Constitutional convention, and since his time popular efforts have been directed to the amendment of his system.

Jefferson's "republican form" is at last realized under the machinery of the modern republic, in the Oregon Constition, which is before this court for judgment.

It is a living, breathing ideal, pitted against a decaying device.

6. PUBLIC OPINION IN 1787.

Madison in Federalist, Letter 43, explains the purpose of the guaranty clause and says "Whenever the States may choose to substitute other republican forms, they have a right to do so and to claim the federal guaranty for the latter."

Not to burden this presentation with citations which relate to current opinion at the adoption of the Constitution, one resolve is submitted which is monumental in its character and spoke the unanimous judgment of Massachusetts in the definition of free government.

"Resolved, unanimously, that the government, to be framed by this convention shall be a FREE REPUBLIC."

"Resolved it is of the Essence of a free Republic, that the people be governed by fixed laws of their own making."

Such was the preliminary declaration of the framers of the Massachusetts Constitution in convention assembled. Journal of the Convention, p. 24, Sept. 3d, 1779.

In this convention were James Bowdoin, President; Samuel Adams, John Hancock, Oliver Wendell, John Lowell, John Adams, John Pickering, Theophilus Parsons, Samuel Phillips, Jr. George Cabot, Capt. Chas. Sergeant, Nathaniel Gorham, Joseph

Allen, Gen. Jonathan Warner, Caleb Strong, John Cotton, William Cushing, Robert Treat Paine, David Sewall, James Sullivan, afterwards Attorney-General, many of whom are immortals in American history, and most of whom were as capable of defining the term "free republic," as any citizens of the new republics of America.

This definition of a free republic by the Massachusetts Constitutional Convention of 1779 has a parallel in the extemporaneous definition given by Governor Randolph in the Virginian Convention for the ratification of the United States Constitution.

"The empire of government of laws—is that in which the laws are made with the free will of the people: Hence, then, if laws be made by the assent of the people, the government may be deemed free." Elliot's Debates, Vol. 3, p. 34.

7. STATEMENTS IN CONSTITUTIONAL CONVENTION

The meaning of the term "republican form" was not debated in the convention, so as to define the views of the members, saving such utterances as will be found later under the heading of "Sovereignty."

The only form submitted which may have value is that of Randolph at a later stage of the convention, who made the following proposition to meet the wishes of the small states.

"III—That the people of each State ought to retain the perfect right of adopting, from time to time, *such forms of republican government as to them may seem best* and of making all laws not contrary to the articles of Union; subject to the supremacy of the general government in those instances only in which that supremacy shall be expressly declared by the articles of the Union."

Nowhere in Constitutional debates is an excess of power reserved to the people themselves even hinted at as unre-

publican. Some distrust of popular government was expressed by Gerry and others, but there was no suggestion of curbing these powers in the States.

IV. What Is "Republican Form?"

A. *NO FIXED STANDARD OF REPUBLICAN FORM.*

1. IN THE STATES.

Within the limits of the free exercise of the sovereign power of the people, there was no essential form fixed in the minds of the framers of the Constitution.

The separation of the three departments of government was not a vital feature of the new States formed from the colonies. It has been held by this Court that a legislature may exercise judicial functions.

Satterlee v. Matthewson, 2 Peters, 413.

It was not essential that executive power or judicial functions should be vested in separate bodies. New Hampshire had no governor but a mere president appointed by the Council. Says Bancroft, "Here is a government without an executive which merged the executive power in the two branches of the legislature and made no provision for courts." (History of U. S., Vol. 8, page 243).

John Adams made strenuous objection to the creation of legislatures in a single body yet such was the form of the Pennsylvania Constitution.

John Adams' Works, Vol. 4, page 202.

Most of the States gave the veto power to the governor, yet Virginia withheld it "warned by its royal misuse."

Life tenure for judges was not universal; by the New Jersey Constitution, judges were appointed by the legislature for 5 and 7 years. The length of official tenure was not regarded as vital

even though John Adams pronounced that there was not "in the whole circle of the sciences a maxim more infallible than this: 'where annual elections end, there slavery begins.'"

2. FORMS VARIABLE AND ELUSIVE.

There is some significance in the limitations of the guaranty to the "form" of a republic. It is doubtful if anything can be challenged but the form, and it might well have been considered that with the proper forms the people would see to their proper execution, and if they did not it should be no concern of the United States. Were this not so, the most trifling occasions and technicalities might be availed of to call the central power to interfere with State administrations.

Mexico was undoubtedly Republican in form under Diaz, but the forms were perverted to a dictatorship; yet a mere show of revolution restored the people to their use of the duly provided forms. Such self-corrective power of State autonomy was doubtless relied upon when the form alone of Republican government was required of the States. Of such form the only test is the character of the general fabric.

Our experience with the Constitution of the United States has witnessed the practical nullification of many of the forms which were provided. The electoral college is non-existent as an independent body; the power of the President's cabinet is extra-constitutional; the senatorial power to consent to official appointments has become practically the control of such appointments.

Woodrow Wilson insists (Congressional Government, page 306) that the Constitution "is now our form of government rather in name than in reality, the form of the Constitution being one of nicely adjusted ideal balances, whilst the actual form of our present government is simply a scheme of congressional supremacy."

In England the Premier has boldly declared that "the King's veto is as dead as Queen Anne," and the recent concession by the

House of Lords of a vast portion of this power is a mighty change in substance without a change in form.

It was Lord Butler who well said, "The forms of a free and the ends of an arbitrary government are things not altogether incompatible."

John Adams in his "Thoughts on Government" (Works, Vol. 1, page 193) rebuked the poet Pope for false philosophy expressed in his lines, "For forms of government let fools contest; that which is best administered is best." "Nothing," said Adams, "can be more fallacious than this; nothing is more certain than that some forms of government are better fitted for being well administered than others."

The later provisions of Article 4, Section 4 for cases of invasion and domestic violence are very impressive in their suggestion that the substance of republicanism is to be preserved under that portion of the article, and that under the guaranty clause, the States are required only to furnish the *forms* of a free republic.

It is quite apparent that there are no particular forms contemplated as Republican by the Constitution.

"In the Constitution of Pennsylvania the executive department exercises judicial powers in the trial of public officers.—In New Jersey, in Georgia, in South Carolina and North Carolina the executive power is blended with the legislative."

James Wilson in Elliot's Debates, Vol. II, p. 505.

Clearly the direct election of representatives is not a requisite, as this very Court consists of men appointed by the President who is elected by an electoral college. It is likewise plain that a limited tenure is not essential as the members of this Court hold their offices during good behavior.

In the Constitutional period the selection of judges was not by the people but in the form of appointment under the English precedents. That the people of most of the States have decided to elect their judges constitutes clearly no invasion of

the republican form. If it be true that the only basic requisite of republican form be its recognition of the continuing sovereignty of the people, such form would seem to relate to the machinery of the government; the shape it takes must be such that the popular will shall be in all parts operative or shall always permit expression of consent of the governed.

Pure Democracy has never been regarded as inconsistent with such form, but on the contrary has been deemed its most perfect form.

Oligarchy and monarchy are the only inconsistent forms, namely, the power of one or of less than a majority to determine the rights of the whole.

There is no doubt that the speech of James Wilson in the Convention of Pennsylvania for the Ratification of the Constitution, November 24th, 1787 exercised a profound influence upon the public opinion with respect to the Federal Constitution.

B. *"DEMOCRATIC" AND "REPUBLICAN" SYNONYMOUS.*

It is apparent from the discussions of the Constitutional period that no distinction existed in the larger conception of the words "democracy" and "republic." This is true even of ancient authorities.

"There are three sorts of public government, to wit: Monarchy, which is regality or kingship, Oligarchy, which is the government by peers and nobles and Democracy, which is a popular or (as we term it) a free State."

Plutarch's Morals, Vol. V, p. 396.
Tacitus' Annals, Book IV, Ch. 33.

"If we consider the nature of civic government, we shall find that, in all nations, the supreme authority is vested either in the people, or the nobles or a single ruler."

Charles Pinckney a member of the Constitutional Convention quotes Paley, Vol. II, 174, 175, who enumerates three forms of government, Despotism, Aristocracy, and a Republic and defines the latter as "a republic, where the people at large EITHER COLLECTIVELY OR BY REPRESENTATION form the legislature." Elliot's Debates, Vol. IV, p. 328.

Hamilton in his brief for argument on the Constitution of the United States (1788, Works, Vol. II, p. 463) makes it plain that "republic" was a term variously understood. He asserts that it has been applied to aristocracies and monarchies as Rome and Great Britain under kings, Sparta and Carthage through a *senate for life*, Netherlands through aristocracy and monarchy.

He adverts to the confusion about the words Democracy, Aristocracy and Monarchy, designating Democracy, as defined by Rousseau, as a government exercised by the collective body of the people and any delegation creating an aristocracy. But he says:

"Democracy in my sense where the *whole power of the government in the people;* 1, whether exercised by themselves or, 2, by their representatives, chosen by them either mediately or immediately and legally accountable to them."

He divides governments not into Republics &c., but into Democracy, Aristocracy, Monarchy, and defines *Aristocracy*—"Where whole sovereignty is permanently in the hands of a few for life or hereditary" and *Monarchy*—where whole sovereignty is in the hands of one man for life or hereditary."

The "consequence" is that the United States Government is a "representative *Democracy.*"

John Marshall in Virginia Debates on Constitution, (Elliot's Debates, Volume 3, page 222) deals with the United States Constitution as creating a "Democracy."

"I conceive that the object of the discussion now before us is whether Democracy or despotism be most eligible. I am

sure that those who framed the system submitted to our investigation, and those who now support it intend the establishment and security of the former.

"We, sir, idolize the Democracy; those who oppose it have bestowed elogiums on monarchy. We prefer this system to any monarchy, because we are convinced that it has a greater tendency to secure our liberty and promote our happiness. We admire it because we think it a well-regulated Democracy. It is recommended to the good people of this country; they are through us to declare whether it be such a plan of government as will establish and secure their freedom."

"Switzerland," that confederate republic, has stood upwards of 400 years; and although several of the individual republics are democratic and the rest aristocratic, no evil has resulted from this dissimilarity." Patrick Henry, in Virginia Debates, Elliot's Debates, Vol. IV, p. 62, and at p. 44,—"Holland is not a Democracy wherein the people retain all their rights securely."

James Wilson said (Elliot's Debates Vol. II, page 365) "then let us examine, Mr. President, the three species of simple governments which are . . . the monarchial, aristocratical and democratical."

C. *THE REPRESENTATIVE SYSTEM.*

1. A NECESSITY: NOT A PRINCIPLE.

Historians are agreed that where Democratic forms have prevailed they have yielded to representative or delegate forms only from the necessities arising from extension of population and territory. It has been pointed out (*supra* III, B. 4, a.) that this was true of the Teutonic institutions of England.

Concerning the Plymouth Colony, "The government was first a pure democracy; the whole body of the people often met and divided upon affairs both executive and legislative. As their numbers increased, this was found inconvenient;

and in 1639 a House of Representatives was established, and Representatives elected from the several towns."

Pitkin's History United States, p. 34.

Bancroft's History of United States, Vol. VIII, p. 370, says:

"The Republics of the ancient world had grown out of cities, so that their governments were originally municipalities; *to make a republic possible in the large territories* embraced in the several American Colonies *where the whole society could never be assembled*, power was to be deputed by the many to the few, who were to be elected by suffrage, and were in theory to be a faithful miniature portrait of the people."

The Charter of "the Governor and Company of Massachusetts Bay, granted 1629 by Charles I, provided that

"The freemen of the company were to hold a meeting four times a year; and they were empowered to choose a governor, etc.:"

"After their arrival in Massachusetts, their numbers increased so rapidly that it became impossible to have a primary assembly of all the freemen, and so a representative assembly was devised after the model of the Old English County Court."

John Fiske's "Civil Government in the United States," pp. 161, 162. (Cambridge Press Edition, 1902).

"As a Republican, sir, I think that the security of the liberty and happiness of the people from the highest to the lowest, being the object of government, the people are consequently the fountain of all power. They must, however, delegate it to agents because from their number, dispersed situation and many other circumstances, they cannot exercise it in person."

Edmund Pendleton, Elliot's Debates, Vol. 3, 298.

Mr. Wilson, a Swiss Official, says of the Initiative and Referendum in Switzerland that

"They have given back to the people the right they once possessed to take part in the legislation of their respective Cantons. The right was surrendered when the people *became too numerous* to assemble together for law-making, and so representatives were chosen to make the laws."

The conception of a general assembly of the State is involved in the address of the Massachusetts "Convention for framing a new Constitution of government"—to their constituents, March 2, 1780.

"Could the *whole* body of the people have convened for the same purpose, there might have been equal reason to conclude that a perfect unanimity of sentiments would have been an object not to be obtained."

Journal of Mass. Convention Appx., p. 216.

John Adams in Thoughts on Government, Vol. IV, p. 194, says:

"As good government is an empire of laws, how shall your laws be made? *In a large society, inhabiting an extensive country, it is impossible that the whole should assemble to make laws.* The first step, then, is to depute power from the many to a few of the most-wise and good," and at p. 195—"This representative assembly—should be in miniature an exact portrait of the people at large. It should think, feel, reason and act like them."

2. PHILOSOPHY OF REPRESENTATIVE SYSTEM.

The conception that the principle of representation somehow qualifies the sovereignty of the people suggests the German adage!

"Wo die Begriffe fehlen, da stellt zu rechter Zeit ein *Wort* sich ein."

(When comprehension fails, a *word* happens opportunely in.)

It is true in the larger sense that the whole government must represent the popular will, but it is not true that all its functions

must be performed through delegates. It suffices if the things done "represent the will of the majority of the people" and this is the length and breadth of the representative system in a Republican government. The manner in which this is accomplished is merely functional and in no sense fundamental.

It does not need argument or citations to prove that our governments are and must be affected by the representative principle and practice. The error of the appellant in his claims is in assuming that legislation *must* under the Republican principle take the form of a delegated power. The various expressions indicating that some kinds of representation are necessary are essentially true because all acts of government cannot be performed by the mass. Even in the forum of Rome, there were senators, tribunes, praetors and ædiles. In the town meeting, the present form of democracy, sit the selectmen, assessors, town clerk, constables and other representatives of the people of the town in the execution of their behests. There sits the justice of the peace, their agent or representative to perform the judicial functions. Clearly the citizens in mass cannot pay bills, assess and collect taxes, keep the records and make arrests.

A democracy without agents and representatives is inconceivable. In the executive functions, the representative system is physically essential to a pure democracy.

The judicial functions might be exercised directly by judgments and decrees settled in mass, but the service and execution must be delegated to certain persons.

But the legislative or law-making power may be physically exercised without the intervention of agents or the power may be delegated to agents who are called "representatives," because they in theory carry out the will of the electorate. Hence representative legislation is the exercise of the people's sovereignty, not by virtue of any sovereign power inherent in the persons who represent, but purely by virtue of the sovereignty imparted to them by the people.

There is no legal or constitutional principle which warrants the claim that when the people decline to delegate their sovereignty, the republic fails.

Representation so far as it is a necessity must exist, but the necessity is limited and variable, and between its maximum and minimum is no line which marks the Republican boundaries.

Legislators may be dispensed with and the popular will remain in full power. A legislature is no more essential to a Republican form, than agents are essential to a business. They may be functionally necessary, but do not inhere in the business.

James Wilson (Elliot's Debates, Vol. II, page 358) says that even in England, "though we find representation operating as a check it cannot be considered as a prevailing principle."

3. POWER OF LEGISLATURES DELEGATED AND LIMITED.

a. *DELEGATED POWER.*

The legislature is a pure creature of the State. While it is necessary to make laws, it is not necessary to have legislatures. If the people choose they may cease to create, and the creature will cease to exist.

The status of legislatures is already well established in the decisions of this court. In

Van Horn's Lessee *v* Dorrance, 2 Dall. 304,

Mr. Justice Patterson describes the source and extent of legislative power.

"The Constitution of England is at the mercy of Parliament. Every act of Parliament is transcendant and must be obeyed."

In America "a constitution is the form of government *delineated by the mighty hand of the people*, in which certain first principles of fundamental law are established. It contains the permanent will of the people and is the Supreme *law* of the land; it is paramount *to the power of the legislature*, etc.—The legisla-

tures are *creatures* of the *constitution:* they owe their existence to the constitution, they derive their powers from the constitution. The *constitution* is the work or will of the people themselves in their original, sovereign and unlimited capacity. Law is the work or will of the legislature in their derivative and subordinate capacity. The one is the work of the creator, and the other of the creature. The Constitution fixes *limits to the exercise of the legislative authority, and prescribes* the orbit in which it must move."

Calder *v* Bull, 3 Dall. 386, states:

"It is a self-evident proposition that the several State legislatures retain all the *powers of legislation delegated to them by the State constitutions*, etc."

Fletcher *v* Peck, 6 Cranch 87, says:

"One legislature is competent to repeal any general act, which a former legislature was competent to pass, and one legislature cannot abridge the powers of a succeeding legislature."

Hamilton (Works, Vol. 2, page 322) recognized the exact limits of legislative power.

"Happily for this country the position is not to be controverted that the Constitution is the creature of the people; but it does not follow that they are not bound by it, while they suffer it to continue in force; nor does it follow that the legislature which is, on the other hand, a *creature of the Constitution*, can depart from it on any presumption of the contrary sense of the people. *All the authority of the legislature is delegated to them* under the Constitution; their rights and powers are there defined."

James Wilson (Elliot's Debates, Vol. II, p. 446) says:

"The supreme power resides in the people—They can delegate it in such proportions to such bodies, on such terms, and under such limitations as they think proper."

Story, (Comm. 1, Section 628) commenting upon the fact that the new confederation which had been created by the legislatures of the States really had no Constitutional authority, remarks. "If the State in its political capacity had it (the right) it would not follow that the legislature possessed it; that must depend upon the powers confided to the State legislature by its own Constitution; a State and the legislature of a State are quite different political beings."

b. *LIMITED POWER; INSTRUCTION AND RECALL.*

These powers of sovereign control over legislators have been recognized since representative government began in this country.

The Body Liberties of Massachusetts Bay Colony, 1641, No. 67, declares:

"It is the constant libertie of the freemen of this plantation to choose yearly at the court of election out of the freemen all the general officers of this jurisdiction. If they please to discharge them at the day of election, by way of vote they may do it without showing cause, but if at any other general court, we hould it due justice that the reasons thereof be alleadged and proved." From laws of New Hampshire, Volume 1, page 759.

The Articles of Confederation (March, 1781) recited:

"For the more convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislature of each State shall direct to meet in Congress on the first Monday in November of every year, *with a power reserved to each State to recall* its delegates, or any of them, at any time within the year, and to send others in their stead for the remainder of the year."

The original form of Constitution introduced by Randolph in the Constitutional Convention provided for a House of Rep-

resentatives elected by the people "and to be subject to recall." Apparently this provision dropped out of the later forms without discussion.

The instances of instructions to delegates in the Colonies are too numerous to recite.

The Boston town meetings had frequently instructed their representatives, though they were such men, for instance, in 1768, as James Otis, Samuel Adams, John Hancock, and Thomas Cushing, and did so in 1764, '65, '67, '68, '69, '70, '72, and '74.

The town meeting in Boston in May, 1764, after electing four representatives, proceeded to instruct them as follows: "By this choice, we, the free-holders of the town, have delegated you the power of acting in our public concerns, in general, as your prudence shall direct you; *reserving to ourselves the Constitutional right of expressing our minds and giving you such instructions upon important subjects, as at any time we may judge proper,*" and then proceeded, through John Adams, who acted as spokesman, to lay down the principles of self-government in opposition to the claims of the British Parliament.

It has been well stated that

"This Constitutional Right of expressing their minds and giving instructions inevitably resulted from the fact that in both Boston and New Plymouth all freemen had originally a personal voice in the transaction of public business at the General Courts." (History of Elections in the American Colonies, by C. F. Bishop.)

D. *"SOVEREIGNTY" THE ONLY TEST OF FORM.*

1. WHAT IS SOVEREIGNTY?

"Sovereignty is the right to govern."

"Our governors are the agents of the people and at most stand in the same relation to their sovereigns in which regents

in Europe stand to their sovereigns." Justice Wilson in Chisholm *vs.* Georgia, 2 Dall. 470.

Sovereignty necessarily implies supremacy; it is indivisible, indefeasible and inalienable, though it may be delegated. Jameson Constitutions, p. 20.

"There can be no subordinate sovereignty"—

"There cannot be two sovereign powers on the same subject."

James Wilson in Elliot's Debates, Vol. II. pp. 443, 456.

Hamilton has well said in the Constitutional Convention (Elliot's Debates, Vol. V, page 202) "two sovereigns can not co-exist within the same limits."

This principle makes it impossible that the sovereignty of the people should co-exist with the sovereignty of the legislature.

If a legislature be sovereign it must have final power to make laws; possessed of such power the anomaly is presented of sovereign States which are compelled to create legislatures to be sovereign over the people who created them.

Sovereignty is not a matter of degree but of kind.

James Wilson (Journal of Massachusetts Convention, 1788, p. 364) says "In all governments . . . there must be a power established from which there is no appeal and which is, therefore, called absolute, supreme and incontrollable. The only question is where that power is lodged."

See also Charles Pinckney in South Carolina Debates (Elliot's Debates, Vol. IV, p. 327).

2. WHERE IS THE SOVEREIGNTY?

a. *IN THE PEOPLE.*

"The people are the only legitimate fountain of power." James Madison, Federalist No. XLIX.

"Our political creed is, without a dissenting voice that can be heard, that the will of the people is the source, and the happi-

ness of the people the end, of all legitimate government upon earth." John Quincy Adams in his first message to Congress.

In the United States the Supreme power "remains and flourishes with the people, and under the influence of that truth we at this moment sit, deliberate and speak.....that the supreme power, therefore, should be vested in the people is, in my judgment, the great panacea of human politics. It is a power paramount to their constitution, inalienable in its nature and indefinite in its extent."

James Wilson, Journal of Mass. Convention, 1788, p. 365.

"A share in the sovereignty of the State which is exercised by the citizens at large in voting at elections—in a Republic ought to stand foremost in the estimation of the law. It is that right by which we exist a free people.—That portion of the sovereignty to which each individual is entitled can never be too highly prized."

Hamilton, in Works, Vol. VI, p. 271.

"The legislatures have no power to ratify it. They are the mere creatures of the State constitutions and cannot be greater than their creators.—Whither then must we resort? *To the people, with whom all power remains that has not been given up in the constitutions derived from them.*" It was of great moment, he observed, that this doctrine should be cherished, *as the basis of free government.*

Geo. Mason of Virginia (Elliot's Debates V, p. 352).

Abraham Lincoln said in a speech at Peoria in 1854: "According to our ancient faith the just powers of government are derived from the consent of the governed. * * * Allow all the governed an equal voice in the government and that and that only, is self-government."

Charles Pinckney, one of the delegates in the Philadelphia Convention, spoke in the ratifying Convention of South Carolina (Elliot's Debates, Vol. IV, pp. 318, 326), as follows:

"We have been taught here to believe that all power of right belongs to the people; that it flows immediately from them, and is delegated to their officers for the public good; that our rulers are the servants of the people, amenable to their will and created for their use."

Speaking of the United Netherlands, he says:

"According to my idea of the word it is not a republic; for I conceive it as indispensable in a republic that all authority should flow from the people."

b. *PASSAGE FROM STATE TO PEOPLE.*

The idea of sovereignty in the people was not original with the makers of the constitution. Locke and Rousseau had long before expounded the principle.

It found its first great expression in the Declaration of Independence at the hands not of the people but of "the representatives of the United States of America in Congress assembled."

There is no doubt that the original conception of sovereignty by the colonies was that of corporate sovereignty. The articles of confederation were made not by the people but "between the States of New Hampshire, Massachusetts Bay, etc," and each State asserted therein "its sovereignty, freedom and independence."

The articles were prepared by a legislature which had no authority from the people, and they were referred for ratification not to the people but to the legislatures of the State. The submission by the people of this legislative usurpation in the framing of their national government shows how imperfect was the existing conception of popular sovereignty. The people had just formed their constitutions and hugged them as a dear possession secured by their blood and sufferings. They were jealous of their State independence, and the weak alliance of the confederation proved pitiably ineffective because the States would not trust sufficient delegation of national power.

"Oliver Ellsworth of Connecticut, said in the Federal Convention:

"As to the first point he observed that a *new set of ideas seemed to have crept in since the articles of confederation* were established. *Conventions of the people*, or with power derived expressly from the people, *were not then thought of*. The legislatures were considered as competent. Their ratification has been acquiesced in without complaint."

On the first impact of independence and supreme authority, the State seemed to be the prize which revolution had secured. The confederation was a beginning not an end; constitutional confederation constituted progress in popular government. Yet it was but the opening of the expanding system of self-government which was to ripen into more perfect forms such as are represented in the full legislative sovereignty of the people of the State of Oregon under their amended constitution.

3. DIRECT EXERCISE OF SOVEREIGNTY BY THE PEOPLE.

a. *STATES ENTITLED TO CHOOSE THEIR FORMS.*

Webster described the unlimited power of sovereignty in his reply to Hayne:

"The people, sir, erected this government. * * * Gentlemen do not seem to recollect that the people have the power to do any thing for themselves."

George Washington said in his farewell address: "The basis of our political system is the right of the people to make and alter their constitutions of government."

"For I insist if there are errors in government, the people have the right not only to correct and amend them, but likewise totally to change and reject its form; and under the operation of that right the citizens of the United States can never be wretched beyond retrieve unless they are wanting to themselves."

James Wilson, Journal of Mass. Convention, 1788, p. 364.

The Declaration of Independence, to the principles of which all new States have been expressly required upon their admission to the Union to conform, asserts the supreme right of the people "to institute new government, laying its foundation on such principles and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness."

The people of Buckingham County instructed their delegates to the Virginia Convention, which first declared the independence of the colonies, in the words, "the Supreme Being hath left in our power to choose what government we please for our civil and religious happiness."

The bill of rights of the Massachusetts Constitution declares that by right, the people of the Commonwealth, "invest their legislature with authority" and "provide for an equitable mode of making laws."

b. *SOVEREIGNTY EXTENDS TO CONSTITUTIONS AND STATUTES.*

Constitutions are not limited to organic law.

Whatever may be the theoretical and aesthetic division between organic and statute law, this division, as to Constitutions is urged only by text-writers as a matter of policy, and nowhere has a court undertaken to limit constitutional conventions or constitutional amendments to organic law.

The original Constitutions of the States contain many provisions of a statutory nature, and since that time the practice has grown perhaps to an unreasonable extent; but the practice has its justification in the distrust of legislatures by the people and the necessity they have found of curbing ordinary legislative powers. That extensive provisions of a statutory character are not open to legal or political objection is notably evidenced by the admission of Oklahoma to the Union under a Constitution which is crowded with such provisions. The Courts likewise have not distinguished between such legislative provisions and organic laws.

Constitutional limitations of a statutory character are so extensive that upon analysis of the existing conditions they will be found to constitute the great bulk of constitutional texts. Examine Stimson "Constitutions."

The recognition of this power to enact legislation in constitutional form is a definite recognition of the full authority of the people of a State to enact legislation at their free will, and under such forms as they may constitutionally provide. Nowhere has this court or any other court undertaken to say in what exact form the people shall give expression to their sovereign will. The courts of some States, but not yet of the United States, have recognized that Constitutional conventions may even promulgate Constitutions without the ratification of even the preliminary consent of the people.

However questionable these decisions may be they illustrate the great possible exemptions from fixed forms which are allowed in expressing the popular will, even through the mere process of acquiescence. With how much greater reason is it accorded to the people in united action when they directly declare the law of the State?

No one questions the sufficiency of a Constitution which is ratified by the popular vote, and it seems immaterial and technical to inquire into the form in which popular action is thus expressed. It must be beyond question that if the people choose to determine Constitutional questions directly at the polls rather than through a convention, they have a power to do so, and it must be incontestable that the common practice of initiation of amendments by legislatures is a mere matter of convenience and not of principle. When, therefore, the people of Oregon fixed for themselves the method of popular initiation of Constitutional amendments and a direct vote at the polls upon such amendments, their power so to do cannot be questioned by any court.

It seems to be a necessary corollary to this statement that the people's power at the polls over questions of a statutory

nature is not any more limited than it would be in a Constitutional Convention. If it were otherwise, it would be demonstrated that there is somewhere a judicial or political inhibition upon the people in Constitutional assemblage to pass from a field of organic into a field of statutory enactment, but as is above suggested no such inhibition exists.

We are, therefore, dealing in this case with a mere matter of form which it requires very little ingenuity to change.

In the early history of the Plymouth Colony in 1638, the first experiment with legislation by delegates was made, and it was provided as to any laws which such delegates might enact, "That the freemen at the next eleccon court after meeting together may repeale the same and enact any other usefull for the whole."

The people of Oregon might copy from the Pilgrim Fathers and provide that at each election any laws passed by a previous legislature might be repealed. This would constitute an optional referendum of all legislative acts. Surely with a greater sovereign power than could ever be conceded to the Plymouth Colonists, the people of Oregon might declare that every election should constitute a Constitutional Convention of the people to propose and enact their own measures as well as to repeal those of the legislature. Such indeed is the practical operation, and it may be said, the legal effect of the constitutional provisions now in force in Oregon.

Each gathering of the people at election day is in effect a constitutional convention at which the sovereign powers of the people are only limited by their own Constitution and the Constitution of the United States.

Constitutions are creators of law—they are called organic law, because they contain the plan or means of government, and the making of a Constitution is legislation of the highest type. Legislatures cannot meddle with it.

Threadgill *v.* Cross, 109 Pac. Rep. 558 (Ok. 1910).

It is conceivable that a Constitution might put forth an entire code of the law, and leave no powers to a legislature, giving to the people locally or generally assembled or represented the sole power of alteration through amendment of the Constitution itself. It has not yet been decided that a permanent body of delegates, empowered to legislate, is an essential of a republican form of government. The town meeting still exists unchallenged, and nowhere does it appear that a city, a county and indeed a whole State may not act in like accord, if the people can find methods satisfactory to themselves.

If the perfection of the secret ballot system provides such a method, what prohibitions of ancient charters or customs shall avail against this form of legislating in the State.

c. *THE RIGHT OF DIRECT LEGISLATION.*

When this court inquires into the right of the people of Oregon to make their laws at the polls, it should do so in the spirit of Mr. Justice Holmes when he made similar inquiry as a justice of the Supreme Court of Massachusetts:

"I ask myself as the only question what words express or imply that a power to pass a law (subject to rejection by the people) is withheld." Opinions of Justices, 160 Mass. 594.

. . . "The Supreme power is in a democracy "inherent in the people and is either exercised by themselves or by their representatives." James Wilson, Elliot's Debates, Vol. II, p. 365.

Andrew Jackson, in his inaugural address, said: "Experience proves that in proportion as agents to execute the will of the people are multiplied there is danger of their wishes being frustrated. Some may be unfaithful; all are liable to err. So far, therefore, as the people can with convenience speak, it is safer for them to express their own will."

Commenting on the statement that the people who delegate power "have a *right to resume it*, and place it in other hands

or keep it themselves, whenever it is made use of to oppress them, &c." John Adams answered:

"These are what are called revolution principles. They are the principles of Aristotle and Plato, of Livy and Cicero and Sidney, Harrington and Locke; the principles of nature and eternal reason; the principles on which the whole government over us now stands. It is therefore astonishing, if anything can be so, that writers, who call themselves friends of government, should in this age and country be so inconsistent with themselves, so indiscreet, so immodest, as to insinuate a doubt concerning them." Works, Vol. IV, p. 14.

Jameson (Constitutions, p. 21) says:

"Sovereignty manifests itself in two ways, *first indirectly*, through individuals, acting as the agents or representatives of the sovereign and constituting the civil government; and *secondly, directly*, by organic movements of the political society itself without the ministry of agents."

"A portion of this sovereign power has been delegated to government which represents and speaks the will of the people so far as they *choose* to delegate their power."

Luther *vs.* Borden, 7 How. 29.

The sovereignty of the people being conceded the claim that the law making power can only be exercised through delegates has a fair parallel in the reasoning of the chambermaid, who insisted upon hanging a picture of the leaning tower of Pisa awry, and explained that she could only get the tower to hang straight by hanging the picture crooked.

The assertion that the sovereignty of the people is sufficiently exercised by a legislature, is well met in the words of Washington, when the Confederation was toppling and he was asked to use his influence:

"Influence is not government."

d. *OREGON IS A REPUBLIC.*

If the people reserve their original power to themselves and delegate to their agents only limited legislative functions, the republican form is not lost but perfected. The only test of such form is the supremacy of the popular will, and nowhere is it supreme except in the original exercise. Any uncontrolled delegation is a qualified or indirect supremacy.

A monarchy is not less a monarchy because the sovereign elects to act personally rather than through ministers; aristocratic sovereigns need not put their power out of their own hands in order to act effectively. By what token shall it be said that a sovereign people, constituting a republic, ceases to be republican, when it dispenses with delegates and acts directly?

Surely the people may grant such restricted power to their delegates as they choose, and powers not granted and thus reserved are not lost to the people. We cannot make any key fit such a lock.

There is no law, which sets the legislature above the people; not in the decisions of Courts, not in the Constitutions or the conventions which made or ratified them, not in early colonial history, where pure Democracy had been the foundation of government.

There is a rank incongruity in the propositions that in a republic the people must be sovereign, and that a government ceases to be a republic when the people refuse to delegate all their sovereign power of legislation to agents.

A people is not sovereign which has not the power to exercise its sovereignty, and a delegate body is the sovereign if it has power to deny to its principal the right to resume and exercise the delegated power. Only when the sovereign *voluntarily* relinquishes its right to exercise any sovereign function to delegates can the delegates have logical claim to possess the sovereign power. We call this voluntary relinquishment a constitution.

After a century of repetition of the evident truth that delegates of the sovereign function must trace their authority to the constitutional grant, the claim is now made, that our Re-

publican form has ceased to exist, and the republic has disappeared if the sovereign has declined to abdicate its full sovereign power to its agents, and chosen to reserve certain of such powers to itself, and indeed only power which is withdrawn upon the failure of the representatives to represent.

May not the sovereign say to his agents, "You must represent me, you must execute my will, or I shall exercise the power myself." If this illogical contention can stand, it must involve the downfall of the entire theory of popular sovereignty.

James Wilson whose influence in the federal convention and with the people of the States was second to none made brilliant and conclusive answer to the contention of this appellant. "No, sir, I have no right to imagine that the reflected rays of delegated power can displease by a brightness that proves the superior splendor of the luminary from which they proceed."

The People of Oregon have not been disappointed in the direct exercise of their sovereign functions. Nine other States have followed in their footsteps; the wisdom of their course is reflected in the laws they have thus enacted. Democracy has been vindicated; it promises to bring better government, better citizenship and a perfect republic. The people are fit to govern themselves; and are justifying the confidence and injunction of the martyred Lincoln.

" No men living are more worthy to be trusted than those who toil up from poverty; none less inclined to take or touch aught which they have not honestly earned. Let them beware of surrendering a political power which they already possess, and which, if surrendered, will surely be used to close the door of advancement against such as they, and to fix new disabilities and burdens upon them till all of liberty shall be lost."

GEO. FRED WILLIAMS,

Counsel for the States of California, Arkansas, Colorado, South Dakota and Nebraska, who pray to be heard as *amici curiae*.

Of Counsel for the State of Oregon.

Supreme Court of the United States

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tory in order that the facts in this case may have a fuller setting. First, however, we state the issues:—

THE ISSUES.

Following is Plaintiff in Error's concluding prayer to this Court:

> "The question is submitted with confidence that the Court will protect the people in the enjoyment of those constitutional checks and safeguards against their own power which with wisdom and deliberation they created for themselves. Injustice and misrule have characterized all unconstitutional democracies and all popular governments administered in accordance with the whims and caprices of the multitude."
>
> Plaintiff in Error's Brief, p. 154.

This is the broad issue.

The special issues are raised by the assignment of errors, and are as follows:

1. *Is the Initiative system of the State of Oregon a violation of the provision in the Federal Constitution, that "The United States shall guarantee to every State in this Union a Republican Form of Government"?*

Article IV, section 5.

We claim:—

First—That the Congress of these United States, a department that is co-ordinate with this Judicial Department, has repeatedly passed upon the question at issue and, therefore, under the settled practice in this Court it will not trench upon the powers conferred by the Constitution upon Congress.

Marbury vs. Madison, 1 Cranch (U. S.), 137 (1803);

Luther vs. Borden, 1 How. (U. S.) 1 (1849);
Texas vs. White, 7 Wallace (U. S.), 700, 731 (1868);
Taylor and Marshall vs. Beckham, 178 U. S. 548 (1900).

Congress at its last session voted to admit Arizona as a State, and its constitution includes the Initiative system.

In 1907 the Executive Department of the Government, acting under instructions by Congress, passed upon the constitutionality of the Initiative system and expressly held that it is a republican form of government and in harmony with the Declaration of Independence.

The two houses of Congress, each of which possesses the exclusive right to "be the judges of elections, returns, and qualifications of its own members," has for twelve years been admitting members from a State or States in which the constitution includes the Initiative system. Thus, for twelve years the Congress of the United States has been passing upon the question at issue.

Second—But should this Court take jurisdiction we submit that inasmuch as the Oregon Supreme Court has passed upon the constitutionality of the Initiative system in the State government, that this Court will apply the rule of the Federal Courts, and adopt the decision of the State Court on questions concerning the constitution and laws of the State.

Luther vs. Borden, 7 Howard (U. S.), 1;
Taylor and Marshall vs. Beckham, 178 U. S. 548, 578;
Leeper vs. State of Texas, 139 U. S. 462-467.

truth concerning public questions. Three sets of publicity pamphlets are issued by the Secretary of State and mailed to each registered voter at his home. One pamphlet presents the platforms of the candidates within the several parties preparatory to the selection of party leaders. Another is issued after the nominations have been made, and sets forth the platforms of the several nominees. A third platform is issued before the other two, and presents the arguments for the questions of public policy that are to be directly voted upon at the polls.

Furthermore, after months of discussion the questions are directly submitted, without partisan bias because the Initiative and Referendum questions are separated from the partisan ones; the voters go to the polls and a ballot is handed out setting forth the precise issues, *and the decision is by the intelligent and earnest voters. The ignorant and careless voters are eliminated by their failure to mark the referendum questions.* Thus there is an educational qualification, self-operating.

The proportion who fail to mark the referendum ballot averages from 10 to 25 per cent. This is under the Optional Referendum and the Initiative where none but questions of considerable importance are submitted.

It is different under the Compulsory Referendum, which is the system in most States whereby constitutional amendments are submitted. Comparatively unimportant amendments are submitted by the Legislature, *and no way is provided whereby arguments on both sides, or either side, are placed in the voters' hands.*

This vital defect is generally recognized by statesmen. In New York State it led to a recommendation by the then Governor Hughes, now a member of this Court, that a system be devised whereby proposed amendments and arguments should be placed before the voters. Oregon has in-

stalled the needed publicity system. As yet, however, the Legislature in Oregon does not fully represent the people, as we shall presently demonstrate.

Plaintiff in Error objects to the Initiative system, a system whereby the voters can propose to themselves constitutional amendments and statute law, *whenever the Legislature fails to properly represent them,* and Plaintiff in Error asks this Court to declare that this protective power in the voters shall be declared unconstitutional.

We answer by calling this Court's attention to the fact that an Initiative Petition is principally used to take the place of a Constitutional Convention in proposing to the voters the needed changes in the system of government. *Under both systems the people by direct vote enact into law such provisions as meet their approval.* Under both systems Direct Legislation prevails, and during the 135 years of our independent life as a Republic no one has claimed that the people of the several States should not be permitted to directly legislate on whatever subjects they might choose to incorporate into the State Constitutions. To such an extent has this been developed that our State Constitutions resemble codes of laws.

Should this judicial department of the Federal Government interpose and declare that direct legislation by the people when proposed by Initiative Petition is unconstitutional, the restoration of real representative government will be delayed in these United States. We say "restoration of real Representative Government in these United States" because the people lost, in a large measure, their system of representative government by the debasement of the party convention system during the years leading up to 1844. In the words of Senator Benton, written in 1853, in his "Thirty Years in the United States Senate":

People of United States Lost Self-Government During 1830 to 1844.

> "That [Democratic National] convention [of 1844] is an era in our political history to be looked back upon *as the starting point in a course of usurpation which has taken the choice of President out of the hands of the people, and vested it in the hands of a self-constituted and irresponsible assemblage* * * * It was the first instance of such a disposal of the presidency—for these nominations are the election, so far as the party is concerned; but not the last. *It has become the rule since, and has been improved upon.* These assemblages now perpetuate themselves, through a committee of their own, ramified into each State, sitting permanently from four years to four years; and working incessantly to govern the election that is to come, after having governed the one that is past. The man they choose must always be a character of no force, that they may rule him; and they rule always for their own advantage—'constituting a power behind the throne greater than the throne.' * * * *Until this convention system is abolished, and the people resume their rights, the elective principle of our government is suppressed; and the people have no more control over the selection of the man who is to be their President, than the subjects of kings have over the birth of the child who is to be their ruler.*" (Thirty years in the United States Senate, vol. II, pp. 595-596, by Senator Thomas H. Benton. Italics ours.)

The usual name for this system of government is Machine Rule. More in detail, it is Machine Rule Party Government, as distinguished from People's Rule Party Government.

Ruling System of Government (Party Government) Is Outside the Written Constitution.

Party Government is the system of government in this country, as we all know, *and it is nowhere mentioned in*

the Federal or State Constitutions. It is an extra-legal system.

It is in several parts:—

First. There is an immense number of Party Committees. In each of the two great parties of today there are something like 100,000 precinct committees and 25,000 county committees; 392 congressional district committees; 48 state committees, and one national committee. This is the organization within each of the two great parties.

Second. There used to be a large number of Party Legislatures (Party Conventions), all of which were outside of the constitutional legislatures, and these Party Legislatures decided party policies and elected officers within the party and nominated the candidates for public office. Each four years each party has a National Party Legislature or Convention; and each one or two years each party has 48 Party Legislatures or Conventions except as direct primaries and platform conferences have been established in two-thirds of the States. The status in the several States is set forth in Senate Document 603, 61st Congress, 2nd session, page 9.

Every two years 392 Congressional District Party Legislatures or Conventions are held in each party, except as direct nominations have been established in two-thirds of the States.

Every one or two years each party holds 25,000 County Party Legislatures or Conventions, except as direct nominations have been established in two-thirds of the States.

Each year 100,000 Precinct Caucuses or direct elections within the parties (direct primaries) are held by each party for the election of party committeemen and delegates to conventions and the nomination of candidates for public office.

Third. A large amount of Campaign Funds are supplied and used, first, in the contest within each party for the control of the party, and, second, in the contest between the parties. Campaign funds are a necessity, and, therefore, *the citizens who supply these funds are the controlling political power.*

Fourth. The party that comes out successful in the contest between the parties controls each Constitutional Legislature, and does so by means of the Party Caucus—an organization nowhere mentioned in the written constitution.

Fifth. The party leader who heads the ticket in a State or in the Nation, and is successful, becomes the Governor of the State or the President of the United States, each holding public office, *and each being pledged to carry out the legislation indicated by the Party Legislature or Convention, and pledged also to promote in other ways the interests of the party;* whereas each party leader when in public office is usually inclined to state that he is the representative of the whole people.

Such is the system of government in the United States—Party Government. It operates through the Constitutional Government.

Party System Invaluable if People Are to Rule.

A Party System, of some kind, is a necessity if the people of a nation are to be self-governing or tend toward self-government. They must co-operate politically.

Party Government Is People's Rule or Machine Rule.

Where the Party System is such that the people secure legislation in their own behalf it is People's Rule Party

Government; and where legislation is against the people's interest, being for the ruling few, the system is Machine Rule Party Government. Both are Representative Government, one being genuine and the other counterfeit.

Machine Rule System in United States, 1830 to 1844 and Subsequent Years.

The system of real Federal Government in 1844, described by Senator Benton, was counterfeit representative government—*Machine Rule Party Government.* The people did not control in the Democratic National Convention of 1844, as Benton has clearly stated. In the words of John C. Calhoun, some time previous to the holding of that convention:

> "I object, then to the proposed convention, because it will not be constituted in conformity with the fundamental articles of the republican creed. The delegates to it will be appointed from some of the States, not by the people in districts, but, as has been stated, by State conventions *en masse*, composed of delegates appointed in all cases, as far as I am informed, by county or district conventions, and in some cases, if not misinformed, these again composed of delegates appointed by still smaller divisions, or a few interested individuals. Instead then of being directly, or fresh from the people, the delegates to the convention will be the delegates of delegates, and of course removed, in all cases, at least three, if not four degrees from the people. At each successive remove, the voice of the people will become less full and distinct until, at last, it will be so faint and imperfect as not to be audible. To drop metaphor, *I hold it impossible to form a scheme more perfectly calculated to annihilate the control of the people over the Presidential election, and rest it in those who make politics a trade and live or expect to live on the government.*"
>
> Calhoun's Address to the members of the Democratic party; published in "Thirty Years in the U. S. Senate," Vol. II, p. 596.

Later, in 1853, Senator Benton said:

"Mr. Calhoun considered the convention system, degenerated to the point it was in 1844, to have been a hundred times more objectionable than the Congress caucuses which had been repudiated by the people: *measured by the same scale, and they are a thousand times worse at present*—having succeeded to every objection that was made against the Congress caucuses, and superadded a multitude of others going directly to scandalous corruption, open intrigue, direct bargain and sale, and flagrant disregard of the public will * * *

"One other objection to these degenerate conventions Mr. Calhoun did not mention, but it became, since he made his address, a prominent one and an abuse in itself, which insures success to the train-band mercenaries whose profligate practices he so well describes. This is the two-thirds rule, as it is called; the rule that requires a vote of two-thirds of the convention to make a nomination. This puts it in the power of the minority to govern the majority, and enables a few veteran intriguers to manage as they please. And when it is remembered that many are allowed—even the delegates of whole States—to vote in the convention, which can give no vote to the party at the election, *it might actually happen that the whole nomination might be contrived and made by straw-delegates, whose constituency could not give a single electoral vote.*"

"Thirty Years in the United States Senate."
Vol. II, pp. 597-599.

Machine Rule System in 1888.

Thirty-three years after Benton wrote the above, another description of party government in this country was penned by the Hon. James Bryce, member of the British Parliament. In "The American Commonwealth," published in 1888, Mr. Bryce says:

"During the last fifteen or twenty years, the war issues being practically settled, public-spirited citizens

have addressed themselves to the task, which ought to have been undertaken in 1850, of purifying politics. Their efforts began with city government, where the evils were greatest, but have now become scarcely less assiduous in State and National politics.

"Will these efforts continue, and be crowned by a growing measure of success?

"To a stranger revisiting America at intervals, the progress seems to be steadily though very slowly upward."

American Commonwealth, Vol. II, p. 848, 3rd edition.

The political conditions at the time Mr. Bryce wrote are set forth in his chapters on "The Party System." He describes the party organization, usually spoken of as the "machine"; tells "what the machine is to do"; states "how the machine works," and in conclusion says:

"Observing the form of consulting the voters, the the machine substantially ignores them, and forces on them persons whom they do not know, and would dislike if they knew them. It substitutes for the party voters generally a small number of professionals and their creatures, extracts prearranged nominations from packed meetings, and calls this consulting the pleasure of the sovereign people. * * *

"Thus the Machine works on, and grinds out places, power and opportunity for ILLICIT GAIN to those who manage it."

American Commonwealth, Vol. II, p. 106, 3rd edition. (Capitals ours.)

That this was a correct statement of conditions in 1888 is known to everyone who was familiar with party government in this country at that time. The people were not self-governing; they were ruled by a party organization termed the "machine," and the controlling power in this machine was the secret use of money, very largely.

That the people of the United States were the ruling power previous to the debasement of the party convention system is undisputed. Following is a statement in DeTocqueville's "Democracy in America," written just previous to 1833:

> "The Democratic principle has gained so much strength by time, by events, and by legislation, as to have become not only predominant, but all-powerful. * * *
>
> "The Anglo-Americans are the first nation who have been happy enough to escape the dominion of absolute power. They have been allowed by their circumstances, their origin, their intelligence, and especially by their morals, *to establish and maintain the sovereignty of the people.*"
>
> Vol. I, pp. 67-68; Gilman Edition.

The result of the people's rule—the rule of the multitude or majority rule—is stated by DeTocqueville as follows:

RESULT OF PEOPLE'S RULE, 1776 TO 1836 AND 1844.

> "America exhibits in her social state an extraordinary phenomenon. Men are there seen on a greater equality in point of fortune and intellect, or, in other words, *more equal in their strength, than in any other country of the world or in any age of which history has preserved the remembrance.*".
>
> Vol. I, p. 67.

DeTocqueville further says in the introduction to the twelfth edition, written in 1848:

> "Now this problem, which among us [in France] has just been proposed for solution, was solved by America more than sixty years ago. The principle of the sovereignty of the people, which we enthroned in France but yesterday has there held undivided sway

for over sixty years. It is there reduced to practice *in the most direct, the most unlimited, and the most absolute manner.* For sixty years, the people who have made it the common source of all their laws have increased continually in population, in territory, and in opulence; and—consider it well—it is found to have been, during that period, not only the most prosperous, *but the most stable, of all the nations of the earth.* Whilst all the nations of Europe have been devastated by war or torn by civil discord, the American people alone in the civilized world have remained at peace. Almost all Europe was convulsed by revolutions; America has not had even a revolt. The republic there has not been the assailant, *but the guardian, of all vested rights;* the property of individuals has had better guarantees there than in any other country of the world; anarchy has there been as unknown as despotism."

Stated from a different angle, the result of the People's Rule for the sixty years after 1776 was a tendency to Equal Rights—the termination of Special Privileges—namely:

The establishment of equal rights between families—the putting an end to entailed estates;

The establishment of equal rights within families—the ending of primogeniture, whereby the eldest son took practically all of the family estate;

The establishment of equal rights to an education—the founding of the free public school system; and

The establishment of equal rights between churches, and freedom of religious worship—the separation of Church and State.

These improvements led to equal political rights among white men—the right to vote—the termination of property qualifications. This took place in the East and South during 1800 to 1826. White manhood suffrage existed from the beginning in the West.

Now, compare the results after the people lost self-government:—

RESULTS UNDER MACHINE RULE, 1836 TO 1844 AND 1877.

The ruling few, who operated through machine politics, under the guise of the people's rule, passed laws granting special privileges to themselves, as we have already indicated. These privileges were in the form of charters for railways, charters for State banks to issue paper money, and other forms of privilege. Railroads that had been started under State ownership in Michigan, Pennsylvania, Illinois, and Virginia were all sold out to private corporations (Vol. VI, American Economic Association Series, p. 487). Furthermore, the ruling few who now owned the private monopolies in railway transportation authorized themselves to buy up the competing canals (Vol. V, American Economic Association Series, p. 288). Later the ruling few granted to their railway corporations public lands and public funds, at the same time refusing to limit by law the charges that should be exacted from the people for railroad transportation; they also refused to prohibit discrimination in railway rates.

And the rulers, in the name of the people, issued an immense amount of state and municipal bonds. During the twelve years succeeding 1830, at about which time the rule of the people ended and the rule of the few began, the growth of the public debt in the United States was from $13,000,000 to $200,000,000, *an increase of* 1600 *per cent. All this in twelve years.* (The date is by Prof. Edmund James in American Economic Association Series.)

During 1839 a severe industrial depression occurred, caused by a collapse of the general price level; this, in turn, being due *to the collapse of bank credits and paper money. The State machines began to repudiate the State debts.* The

creditor class and the people in general in order to protect themselves against further issuances of State bonds and paper money and, in other ways, to restrict the excesses of the ruling few, wrested from them in several of the States *calls for constitutional conventions;* and, in each of these conventions the few who gained admission framed provisions and submitted them to the people, *by whom they were enacted into law by direct vote.* Thus, in a limited way, the direct-vote system was temporarily re-established.

Partial Re-Establishment of Voters' Sovereignty at Time of Voting on Constitutional Amendments.

The voters in Pennsylvania were the first thus to attack the rule of the few. A constitutional convention was secured in 1838. Four years later the voters of Rhode Island were successful; as were those of New Jersey in another two years, 1844, and of New York in 1846, with the voters of Illinois triumphed at the end of another two years. Victories in other States followed in rapid succession, Virginia, Michigan and Kentucky in 1850, and Ohio, Indiana and Maryland the next year.

The Granger Uprising, 1870-75.

Not until after the war of 1860-65 did the business men and farmers rise *en masse* against the railway monopolies. This was termed the Granger Uprising, because the newly formed Granges were organizations through which the sentiment of the oppressed could find voice. A constitutional convention was secured in Illinois in 1870, and three years later in Pennsylvania. In Illinois the next Legislature enacted a drastic railway law.

The result is described as follows by President Hadley, of Yale University, in his book on Railroad Transportation:

> "This law was pronounced unconstitutional by Judge Lawrence. The result was that he immediately after

ward failed of re-election on this ground. The defeat of Judge Lawrence showed the true significance of the farmers' movement. They were concerned in securing what they felt to be their rights, and they were unwilling that any constitutional barriers should be made to defeat the popular will. They had reached the point where they regarded many of the forms of law as mere technicalities. THEY WERE DANGEROUSLY NEAR THE POINT WHERE REVOLUTIONS BEGIN.

"But they did not pass the point. The law of 1873 avoided the issue raised by Judge Lawrence against that of 1871. Instead of directly fixing maximum rates, it provided that rates must be reasonable, and then further provided for a commission to fix reasonable rates. Similar laws were passed by Iowa and Minnesota almost immediately afterward. The legislature of Wisconsin went even further, fixing, by the so-called Potter Law the rates on different classes of goods at figures which were quite unremunerative. The railroads made vain attempts to contest these regulations in the courts. They were defeated again and again, and, finally, in 1877, the Supreme Court of the United States sustained the constitutionality of the Granger Laws."

Hadley on "Railroad Transportation," 133-135.

(Capitals are ours.)

Without going farther into the results that have flowed from the rule of the few, we turn to the movement for the restoration of the people's rule.

PEOPLE'S RULE MOVEMENT, 1888 to 1911.

The lifting of the veil from the machine-rule system by Hon. James Bryce, combined with other favorable conditions, resulted in a wide-spread reform sentiment, one that has developed mightily alongside the growth of the machine-rule system itself and the growing concentration of wealth and political power. At the same time, the people

have succeeded in establishing one governmental reform after another:

First. The so-called secret ballot was established. This was largely during the years from 1884 to 1894, but the recent exposure of corruption in Adams County, Ohio, shows that the so-called secret ballot is largely a hoax, at least in certain counties.

Second. Registration of voters was established. This movement took place about the time of the campaign for the secret ballot. Registration of voters was fought and resisted by the ruling few, one of the claims being that it was unconstitutional.

Third. In place of the control of party caucuses by party bosses and their henchmen, the people secured laws from the Legislatures establishing control by public officials and other forms of protection for the voters at the polls. This legal control of party caucuses was bitterly fought by the ruling few.

Fourth. Gradually the people in two-thirds of the States have secured direct nominations for public office in place of nominations for public office by machine rule party conventions, except that the control of the National party organizations, the most important of all, is still retained in far-off delegate conventions. Only in a few States has provision been made for direct choice of Presidential nominees and direct election of delegates to National party conventions.

Fifth. Publicity for campaign contributions and expenditure began to be established in 1890. The movement has gradually developed until at the last session of Congress a law was enacted providing for publicity both before and

after the primaries, and before and after the elections, with limitations upon the amount of money which candidates may lawfully expend.

Sixth. Corrupt practices acts have been largely expanded. In Oregon, in 1908, through the use of the Initiative system a large amount of admirable restrictions have been placed upon party managers and party candidates. Until the establishment of the Initiative system, the people had to secure their reforms from Legislatures controlled by the machine itself which wrote the laws and it frequently inserted loopholes, including unconstitutional provisions to kill the law.

Seventh. In Oregon the people have supplied themselves with publicity pamphlets, as we have said, page 6, above. *This prevents deception and is the cheapest possible way of publishing and distributing the necessary information.*

Eighth. An additional way in which campaign funds are supplied by the people themselves, through their government is set forth in a Colorado law of 1909, appropriating State funds for the necessary campaign expenses and apportioning it among the party committees.

Ninth. The Initiative and the Optional Referendum in combination with Party Government have been established in State after State. In this way the people in seventeen States have taken to themselves or are to vote upon a proposal to take to themselves an option to ballot direct upon public questions whenever they choose to do so, *thereby getting from under the rule of party machines.* The States are Maine, Wisconsin, California, Oregon, Washington, Montana, North Dakota, South Dakota, Nebraska, Colorado, Wyoming, Utah, Nevada, Missouri, Oklahoma, Arkansas and Arizona.

Thus the people in more than one-third of the States of the Union are opening up a way whereby they can gradually *and carefully* reform the machine-rule party government. In other words, the Initiative Petition is being used to take the place of the Constitutional Convention. For example, in Oregon during 1904 under the Initiative system eight per cent. of the voters proposed to their fellow citizens the establishment of direct primaries for the nomination of men to public office in place of nominations by delegate party conventions; and another eight per cent. group proposed to their fellows that they establish in themselves, in each community, a right to decide whether or not intoxicating liquors should be placed on sale. *The people's verdict in both cases was to take to themselves the proposed increase of power.* Thus machine rule on these two important subjects was abolished, or at least largely curbed.

Six years have elapsed since the first use of the Initiative Petition in Oregon to propose to the public important changes in the system of party government and although a considerable number of changes have been effected, *the party organization in the Legislature is not yet wholly in accord with the people's will.* The people have demonstrated that this is so by rejecting the Legislature's proposal that a constitutional convention be called in which the few delegates would possess a monopoly of the right to propose amendments. In other words, machine-rule party government still exists in the Oregon Legislature. In the words of the Hon. W. S. U'Ren, of Oregon City, one of the leaders in the People's Rule movement:

> "The members of the legislature [of 1910-1911] were a very fair lot of men individually and above the average of intelligence, but the session was one of the worst Oregon has had for log-rolling, hasty action and partisan voting, with small consideration for the merits of bills. *The legislature was not at all representative of the people.* All but 23,000 of the voters of Oregon are

progressive, but the gerrymandered districts and plurality system of electing results in giving the tories an actual majority in the legislature. Governor West vetoed nearly seventy of the bills passed and should have vetoed more."

Direct Legislation Record, July, 1911, p. 113.

This demonstrates that in Oregon the machine-rule system is still dominant in the Legislature; but the people possess the Initiative system and are going forward to amend the machine-rule party system until it becomes again real representative government. The next steps proposed by the Oregon People's Power League are: (1) the election of members of the Legislature by proportional representation—that is, the election of ten or more members from a large district in place of one member from a small district wherein a small percentage of voters hold the balance of power and might be swayed by the use of money; and (2) the establishment of majority nominations and majority elections in place of plurality nominations and plurality elections. Majority elections prevailed until the establishment of machine-rule party government, some seventy years ago (Prof. John R. Commons, in Proportional Representation, p. 344—edition of 1907). In early days majority elections were secured by a second election, as is the case today in Continental Europe. An improved system, and the one proposed in the United States, is preferential voting, which is the designation of first choice, second choice, and third choice, thereby securing a majority vote at a single election.

Eleventh. Until the year 1908, the Initiative and Referendum movement was carried on outside of the parties by the organized wage-earners, by many of the organized farmers, and by People's Rule and other leagues. In 1908 the people secured control of the Democratic National Convention and declared for the restoration of their sovereignty. The wording of the platform is as follows:

"The conscience of the nation is now aroused and will free the Government from the grip of those who have made it a business asset of the favor-seeking corporations. It must become again a people's government, and be administered in all departments according to the Jeffersonian maxim, 'Equal rights to all, special priviliges to none.'

"'Shall the people rule?' is the overwhelming issue which manifests itself in all the questions now under discussion."

In the ensuing campaigns the Democratic organization was defeated, but two years later it scored a sweeping success, as also did the people's-rule advocates within the Republican party. Since that time the insurgency within the Republican organization has greatly increased and at a conference of representatives from thirty States in the City of Chicago, early in October this year, the following resolution was adopted unanimously:

"The Progressive movement is a struggle to wrest the control of Government in the Nation and States from the representatives of Special Privilege and restore it to the control of the people."

Such is the broad political situation in this country.

We now present a statement of some of the facts in the case before this Court.

II.

THE SPECIAL ISSUES.

Important Facts in the Case.

The Plaintiff in Error in this case is a public-service corporation that has been taxed by the people of Oregon through

the Initiative system. The reason why the people used the Initiative system is stated as follows in the proceedings of the American Political Association, 1907, p. 213, by Mr. George Thacher, of Portland, Oregon:

> "It is also interesting to note that the report of the Tax Commission shows beyond any doubt that the public service corporations of Oregon have succeeded for years *in escaping paying from one-half to two-thirds of their share of taxes,* principally by the means of exceedingly low valuations of real and personal property, and no mention at all of franchises." (Italics ours.)

Mr. Thacher further explains the situation as follows:

> "The legislature of 1903 created a new system of taxation for the State which was duly adopted. Six months later it was discovered that through inadvertence the law was so framed that it would not go into effect until a year later than it was generally supposed to do. The old tax law having been repealed, the State faced the prospect of no revenue for a year. In that crisis the governor called the legislature in special session to remedy the defect. The legislature, adopting the wisdom ascribed to the man in the nursery rhyme, 'who jumped into a bramble bush and scratched out both his eyes,' promptly repealed the law it had enacted with such pains, and as promptly enacted the law it had previously repealed. The tax law then having its eyes scratched in again, the legislature adjourned. The jump in and the jump out did leave one permanent effect, for whereas formerly a few hundred dollars' worth of property was exempted from taxation in the case of each individual, *now there is no such exemption. It will doubtless be a long day before that supposed injury is forgotten by poor men.* The legislature of 1905 created a tax commission to report at the 1907 session a plan for remodeling the tax laws, *but the people were impatient and laid some taxes themselves at the polls in* 1906."
>
> Proceedings of the American Political Science Association, 1907, p. 212.

This bears out the general principle we have stated in the foregoing pages, that in Oregon the party organization in control in the Legislature does not represent the people. It represents the special interests—the holders of special privileges. Today one of these special interests, a public-service corporation, is the Plaintiff in Error in this Court, and it is asking your Honors to declare void the Initiative system in Oregon, and thereby help to prevent the restoration of the people's rule and of real representative government, which is the special issue in this case.

The Argument by Plaintiff in Error.

But the Plaintiff in Error conceals this real issue and conceals the fact that Congress has expressly passed upon the question at issue. The principal claim of Plaintiff in Error is that the Initiative system is not a Republican form of government, and therefore should be declared void by the United States Supreme Court under Article IV, section 4 of the Federal Constitution, which declares:

> "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."

But Plaintiff in Error does not mention in his Brief the following important facts:—

Points Not Mentioned by Plaintiff in Error.

1. Congress has voted to admit Arizona as a State, and its Constitution includes the Initiative system.

Here is a decision by the Political Department of the Government, and should the Judicial Department claim

jurisdiction for the same question it would lead to a contest beteween the two co-ordinate departments of the government; whereas it is the settled practice in this Court from its very inception not to trench upon the other co-ordinate departments of government. This was expressly stated in Marbury vs. Madison, 1 Cranch, 137, in 1803. In 1849, in Luther vs. Borden, 7 Howard, p. 1, this Court held that the enforcement of the guarantee of a Republican form of government is for the political department—Congress. In the words of this Court in Taylor and Marshall vs. Beckham, 178 U. S. 548:

> "It was long ago settled that the enforcement of this guarantee [of a Republican form of government] belonged to the political department. Luther vs. Borden, 7 How. 1. In that case it was held that the question, which of the two opposing governments of Rhode Island, namely, the charter government or the government established by a voluntary convention, was the legitimate one, *was a question for the determination of the political department;* and when that department had decided, the courts were bound to take notice of the decision and follow it; and also that as the Supreme Court of Rhode Island holding constitutional authority not in dispute, had decided the point, the well-settled rule applied that *the courts of the United States adopt and follow the decisions of the State courts on questions which concern merely the Constitution and laws of the State.*" (Italics ours.)

Such is the settled law in this Court, and the Plaintiff in Error nowhere discusses it. The only mention of Luther vs. Borden is to what Daniel Webster, counsel in the case, is reported to have said on a different point (pp. 5, 23 and 24 of Brief by Plaintiff in Error.)

2. In 1907 the Executive Department of the Federal Government, acting under instructions by Congress, passed upon the constitutionality of the Initiative

SYSTEM, AND HELD THAT IT IS A REPUBLICAN FORM OF GOVERNMENT AND IN HARMONY WITH THE DECLARATION OF INDEPENDENCE.

This decision was by President Roosevelt. The Attorney-General, Charles J. Bonaparte, took the case under advisement and received arguments, and reported to the President that, in his opinion, the Initiative is a Republican form of government. Following is an excerpt from the President's proclamation:

> "Whereas, it appears the said Constitution and government of the proposed State of Oklahoma are Republican in form," etc.

The President did not state his reasons for declaring the Initiative system to be a Republican form of government, nor did the Attorney-General present a written opinion, but in a letter dated December 17, 1907, to Delegate A. L. Deuel, in the Michigan Constitutional Convention, the Attorney-General says:

> "I am in receipt of your letter of the 14th inst., in reference to the Initiative and Referendum clause in the constitution of Oklahoma. The question of whether the Oklahoma constitution was in accordance with the provisions of the enabling act was very carefully considered by the department of justice, but all communications on the subject were made verbally by the Attorney-General to the President. Under these circumstances, it is of course inappropriate for me to attempt to advise you as to the view taken of any specific provision. I can only refer you to the fact, now a matter of common knowledge, that in accordance with the provisions of the enabling act the admission of the State into the Union was proclaimed."
>
> Direct Legislation Record, April, 1908, p. 40.

3. THE TWO HOUSES OF CONGRESS, EACH OF WHICH POSSESSES THE EXCLUSIVE RIGHT TO "BE THE JUDGE OF ELECTIONS, RETURNS AND QUALIFICATIONS OF ITS OWN MEM-

BERS" (Art. I, sec. 5), HAS FOR TWELVE YEARS BEEN SEATING MEMBERS FROM STATES IN WHICH THE CONSTITUTION INCLUDES THE INITIATIVE SYSTEM.

What this means is definitely set forth by the United States Supreme Court in Luther vs. Borden *et al.*, 7 Howard (U. S.), 1, 421, decided in 1849:

> "When the Senators and Representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, *is recognized by the proper constitutional authority.* And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal."

This decision by the United States Supreme Court has been followed in Texas vs. White, in 1868 (7 Wallace, U. S., 700, 731); also in Taylor and Marshall vs. Beckham, in 1900 (178 U. S. 548).

4. POINTS NOT MENTIONED BY PLAINTIFF IN ERROR CONCERNING MEANING OF "REPUBLICAN FORM OF GOVERNMENT":

(a) In 1789 leading Federalists who were advocating the adoption of proposed constitution containing limitations upon the people's power admitted, expressly, that "Republican form of Government" means people's rule, as distinguished from Aristocratic and Monarchical forms of government.

In Letter 43, in the series published in the New York papers by Hamilton, Jay and Madison, it is said :

> *"To the People of the State of New York:*
>
> "The fourth class comprises the following miscellaneous powers * * *
>
> "6. 'To guarantee to every State in the Union a republican form of government; to protect each of them

against invasion; and on application of the Legislature, or of the executive (when the Legislature cannot be convened), against domestic violence.

"In a confederacy founded on republican principles, and composed of republican members, *the superintending government ought clearly to possess authority to defend the system against arisocratic or monarchical innovations.* * * *

"But the authority [of the United States] extends no further than to a *guaranty* of a republican form of government, which supposes a pre-existing government of the form which is to be guaranteed. As long, therefore, as *the existing republican forms are continued by the States,* they are guaranteed by the Federal Constitution. Whenever the States may choose *to substitute other republican forms,* they have a right to do so, and to claim the Federal guaranty for the latter. *The only restriction imposed upon them is that they shall not exchange republican for anti-republican constitutions:* a restriction which, it is presumed, will hardly be considered as a grievance." (Italics mostly ours.)

(*b*) *Federalists' construction followed in Story's Commentaries and Cooley's Constitutional Limitations.*

In "Commentaries on Constitution of the United States" by Mr. Justice Story, in the chapter elucidating Article IV, Section 4, he says:

> "The Federalist has spoken with so much force and propriety upon this subject, that *it supersedes all further reasoning.* 'In a confederacy,' says that book, 'founded on republican principles and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations.'"
>
> Constitution of the United States, by Story, sec. 1815.

In Cooley's Constitutional Limitations it is said:

> "The last provisions that we shall here notice are that the United States shall guarantee to every State a republican form of government, *and that no State shall grant any title of nobility.* The purpose of these is to protect a Union founded on republican principles and composed entirely of republican members, *against aristocratic and monarchical innovations.*"

Cooley's Constitutional Limitations, 7th ed., p. 28, citing the Federalist, Nos. 43 and 44 (probably No. 21 is meant rather than 44), and it is said: "It does not fall within our province to discuss these provisions. They have been much discussed in Congress within a few years, but in a party, rather than a judicial spirit." See—
Story on Const. (4th ed.), c. 41;
Luther vs. Borden, 7 How. 1;
Texas vs. White, 7 Wall, 700;
Cooley, Constitutional Principles, ch. XI.

Evasion by Plaintiff in Error.

This clear-cut authoritative exposition of the clause in question is not even discussed by counsel for Plaintiff in Error, but *obiter dicta* is quoted from some State cases which claim that the rule of the people results in the overthrow of civil liberty. (Pages 104-115 of Brief.)

In these State cases no mention is made of the character of government that is guaranteed by Article IV, section 4, of the Federal Constitution. The judges in these cases merely voiced the old-time arguments of the Federalists against the people's rule.

In discussing the principle involved in the case before this Court the plaintiff in error's brief is fallacious. He fails to mention that this Court has squarely decided that it has no jurisdiction to pass upon the question of whether or not a State has a republican form of government; and the brief fails to mention the Federalists' admission in 1787 that a republican form of government is equivalent to the people's-rule form, a construction that has been accepted by Story, Cooley, by Congress, and by the Executive Department; and plaintiff in error then claims that a republic is not a democracy and conceals at crucial places in his argument the self-evident fact, which he admits in other places, that representative government is not a pure democracy (pp. 80-85). This is unquestionably so. Plaintiff's play with phrases making mere surface showing. If he is held to the points in his brief he will not be able to consider the fundamental issue—the jurisdiction of this Court.

Truth is a unit, and the meaning of "republican form of government" as set forth in the Federal Constitution is shown in many ways. Following are three additional way.:

(c) *Corroborative Proof:*

(1) People the Ruling Power under State Constitutions of 1787.

The claim of Plaintiff in Error is that the representatives in the Legislautres and in Congress are Rulers and not Delegates. Plaintiff's own words are that "the multitude" should not be permitted to control legislation, and this Court is asked to prevent it.

The error in this claim is demonstrated by referring to the State governments in existence in 1787. Following are quotations from State Constitutions:

The North Carolina Bill of Rights of 1776 declares:

"1. That all political power is *vested in* and derived from the people only."

The Virginia Bill of Rights of 1776 declares:

"Section 1. That all men are by nature *equally free and independent,* and have certain inherent rights, of which, when they enter into a state of society, *they cannot, by any compact, derive or divest their posterity;* namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

"Section 2. That all power is vested in, and consequently derived from, *the people.*"

The Maryland Bill of Rights of 1776, says:

"1. That all government of right originates from *the people,* is founded in compact only, and instituted solely for the good of the whole."

The Pennsylvania Bill of Rights of 1776 declares:

"III. That the *people* of this state have the sole, exclusive and inherent right of governing and regulating the internal police of the same."

The New York Bill of Rights of 1777 declares:

"1. This convention, therefore, in the name and by the authority of *the people of this State,* doth ordain determine and declare that no authority shall, on any pretense whatever, be exercised over the people or members of this State *but such as shall be derived from and granted by them.*"

The Connecticut Constitution of 1777 declares:

"That the ancient Form of Civil Government, contained in the Charter from Charles the Second, King of England, and adopted by the People of this State, shall be and remain the Civil Constitution of this State, *under the sole authority of the People thereof, independent of any King or Prince whatever.* And that this Republic is, and shall forever be and remain, a free, sovereign and independent State, by the Name of the State of Connecticut."

In Rhode Island by act of May 4, 1776, the General Assembly transformed the colony to a commonwealth (History of the American People by Prof. Francis N. Thorpe, p. 177). *The sovereignty passed to the people.*

The first constitution submitted in Massachusetts was rejected by the people by direct vote at town meetings in the spring of 1779, because it contained no Bill of Rights and for other reasons. The next constitution submitted, that of 1780, the people adopted by direct vote at town meetings and by more than two-thirds of all who voted. The Bill of Rights declares:

> "Article I. All men are born free and equal, and have certain natural, essential, and inalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness.
>
> "Art. IV. *The people* of this commonwealth have the sole and exclusive right of governing themselves as a free, sovereign, and independent State, and do, and forever shall, exercise and enjoy every power, jurisdiction, and right which is not, or may not hereafter be, by them expressly delegated to the United States of America in Congress assembled."

In New Hampshire four constitutions were submitted to the people who voted directly upon them at town meetings. The first three were rejected (American Political Science Review, Vol. II, p. 549), largely because there were no express limitations upon the power of the Legislature—no Bill of Rights. The Bill of Rights of the fourth one, that of 1748, declares:

> "VII. *The people* of this state, have the sole and exclusive right of governing themselves as a free, sovereign, and independent state, and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction and right pertaining thereto, which is not, or may

not hereafter be by them expressly delegated to the United States of America in Congress assembled."

The Vermont Constitution of 1777 declares:

"IV. That *the people* of this State have the sole, exclusive and inherent right of governing and regulating the internal police of the same."

The New Jersey Constitution of 1776 declares:

"Whereas all the constitutional authority ever possessed by the kings of Great Britain over these colonies or their other dominations, was, by compact, derived from *the people*, and held of them, for the common interest of the whole society; allegiance and protection are, in the nature of things, reciprocal ties, each equally depending upon the other, and liable to be dissolved by the others being refused or withdrawn. And whereas George the Third, King of Great Britain, has refused protection to the good people of these colonies; and, by assenting to sundry acts of the British parliament, attempted to subject them to the absolute dominion of that body; and has also made war upon them, in the most cruel and unnatural manner, for no other cause, than asserting their just rights—*all civil authority under him is necessarily at an end, and a dissolution of government in each colony has consequently taken place.*

* * * * * * * * *

"IV. That all inhabitants of this Colony, of full age, who are worth fifty pounds proclamation money, clear estate in the same, and have resided within the county in which they claim a vote for twelve months immediately preceding the election, *shall be entitled to vote* for Representatives in Council and Assembly; and also for all other public officers, that shall be elected by the people of the country at large."

The Delaware Constitution of 1776 provides:

"The right of suffrage in the election of members of both houses shall remain as exercised by law at present." (Part of Article 5.)

The South Carolina Constitution of 1776 declares:

> "I. That this congress being a full and free representation *of the people* of this colony, shall henceforth be deemed and called the General Assembly of South Carolina, and as such shall continue until the twenty-first day of October next, and no longer."

The Georgia Constitution of 1777 declares:

> "We, therefore, the representatives of *the people, from whom all power originates,* and for whose benefit all government is intended, by virtue of the power delegated to us, do ordain and declare, and it is hereby ordained and declared, that the following rules and regulations be adopted for the future government of this State."

Reviewing the foregoing it is clear that in each of the thirteen State governments of the Revolutionary era the written constitutions declare that *the people are the ruling power,* as distinguished from the rule of a single individual (Monarchy), or of less than a majority (an Oligarchy or Aristocracy). This people's rule was a distinguishing feature of the American State Governments and it is the feature referred to in the Federal guarantee to maintain a "republican form of government."

Another way to show the same thing is as follows:

(2) THE MEANING OF "REPUBLICAN FORM OF GOVERNMENT" IS SHOWN BY CLASSIFYING THE SEVERAL SYSTEMS OF GOVERNMENT FROM THE STANDPOINT OF THE NUMBER WHO ARE THE RULING POWER.

A system wherein *one* individual is the ruler is termed a Monarchy, constitutional or absolute, as the case may be;

A system wherein the rule is by *less than a majority* is an Oligarchy or Aristocracy, or a Plutocracy, or Machine Rule system, or a Trustocracy, depending upon the accompanying elements; and

A system wherein the rule is by *the majority* is a Democracy or a Republic.

Another classification is from the standpoint of *the methods or ways* whereby a ruling power exercises its legislative authority:

A system wherein the ruling power legislates *direct* is termed Direct Legislation;

A system wherein the ruling power legislates *through representatives* is Representative Government or Party Government; and

A system wherein the ruling power legislates *partly direct and partly through representatives* is technically termed Mixed Government, though usually spoken of as Representative Government. Another description is "Party Government in combination with Direct Legislation (or the Initiative and Referendum)."

Words have been put together that point out both the number who compose the ruling power and the method whereby they legislate; for example, Pure Democracy and Representative Democracy, the latter term including the system in use at the present day in the States of the American Union. It includes Direct Legislation for the most important of the State laws, namely constitutional law; and for township laws, local option in cities and counties, ratification of proposed bond issues, etc., etc.

Plaintiff in Error quotes cases which expressly recognize some of the above-described distinctions; for example, that a pure democracy is different from representative democracy (pp. 80-85 of Brief); yet he also seeks to give the impression that democracy means "pure democracy" and that the term "republic" is confined to representative democracy (pp. 80-85). In this, however, he is following Madison in some of his letters in the Federalist (pp. 86-87 of

Brief). But Madison wrote Letter No. 43 (Lodge's Federalist, p. xxiv), in which it is expressly stated that "Republican form of government" is the opposite of Aristocracy and Monarchy (quoted at page 30, above). That conforms to the plain meaning of the term as viewed from the several standpoints.

We now present still another way whereby to demonstrate the fallacy of the contention of Plaintiff in Error, that for the people to rule in this country is unconstitutional.

(3). In State Governments of 1787 the representatives in the Legislatures were subject to instructions by the voters and were pledged by the voters, and through this system the people ruled.

In the States of North Carolina, Pennsylvania, Massachusetts, New Hampshire and Vermont the bills of rights in the State constitutions were worded substantially as follows:

> "No law shall be passed restraining any of the inhabitants of the State from assembling together in a peaceable manner to consult for their common good, nor for *instructing their representatives*, nor from applying to the legislature for redress of grievances."
>
> Constitution of Oregon, 1857, Article 1, section 27.

Further proofs are the newspapers and other written records of that era *in which are chronicled the instructions that were actually given to the representatives.* These records show that at the time of the adoption of the Federal Constitution most of the delegates to the State Conventions were instructed, which reveals a habit of instructing representatives. The evidence on this last named point has been carefully collected by Mr. O. G. Libby, of Wisconsin University, who says:

> "Very many delegates went instructed to conventions, and voted according to their instructions and in

many other cases there was a correspondence between the votes of the delegates and the ascertained attitude of the constituency; *only three exceptions have been discovered.* When the difficulty of recovering such instructions from scattered town records, newspapers, etc., is considered the number of them existing is quite remarkable."

Bulletin of the University of Wisconsin, Vol. 1, pp. 5 and 6.

In a later chapter in which Mr. Libby reviews the evidence from which the foregoing generalization is made, he says:

"The evidence reveals *a habit of instructing representatives, firmly fixed in the political ideas of the time.*"

The evidence which Mr. Libby presents shows that in the States outside of New England the principal method whereby the people voted on the adoption or rejection of the proposed constitution of 1787 was by voting for pledged candidates.

Meaning of Right to Instruct.

What is really meant by a Right to Instruct is stated as follows in the minutes of the Boston town meeting of 1764:

"By this choice they [the freeholders of this town] have delegated to you the power of acting in their Public Concerns, in general, *as your prudence shall direct you; always reserving to themselves the Constitutional right of expressing their Minds, and giving you such Instructions upon particular Matters, as they at any Time shall Judge proper.*"

Proceedings of the American Political Science Association, 1907, Vol. IV, p. 159.

In other words, *the legislative representatives are Delegates (Agents) and not Rulers.* They are clothed with discretionary power except when their constituents shall choose

to decide for themselves. In the Boston town meeting records this right to instruct is spoken of as a "constitutional right," which means that it had existed from time immemorial.

Proof of Use of Instructions.

In the township of Boston the right to instruct representatives in the General Court (Legislature) was exercised twelve times during the seventeenth century. In the eighteenth century such instructions were given at least thirty-six times before the right was inscribed in the State constitution.

Proceedings of the American Political Science Association, 1907, Vol. IV, p. 157.

Following is proof that members of Congress were instructed by direct vote of the people at town meetings, also that two proposals for a State constitution were directly voted upon by the people at town meetings.

The minutes of the town clerk of Weston, Mass., are republished in a volume in which it is said:

> "At a meeting of the freeholders and other inhabitants of the town of Weston, [Mass.] being legally warned, assembled at the public meeting house in said town on Monday, the 12th day of January, 1778, at one o'clock P. M.
>
> 1st. To hear and consider of articles of perpetual union between ye United States of America, formed and proposed to ye legislative body of this state by ye Honorable The Congress *and to instruct your representative to act and to do as you judge mostly for the advantage of this and ye United States.*
>
> "2. To hear an address of ye House of Representatives *to the Inhabitants of this State* setting forth ye reason which induced the House to pass an act for calling in the Bills of Credit emitted by ye government and obviating the objections that have been made to it.

"They then chose Josiah Strong, Esq., moderator.

"1. Voted to accept of the consideration of perpetual union as adopted by the Congress *and that the Representatives be instructed to act accordingly.*

"2. Voted not to hear the second article in the warrant at this meeting."

Twenty days later another special town meeting was held and it was voted not to act upon the warrant.

March 2d the regular annual town meeting was held at which considerable business was transacted and an adjournment taken for one week.

May 18th the freeholders and other inhabitants met to choose a representative in the Great and General Court (Legislature) to assemble May 27th.

Ten days later the freeholders and other inhabitants met at 4 o'clock P. M.—

"1. *To hear the Form of Government as adopted by the Convention of ye Massachusetts Bay AND ACT THEREON.*

"2. To know the minds of the town if they will do anything relative to the War Committee.

"3. Also to know their minds if they will make an additional grant to support the war.

"4. To know the minds of the town if they will allow to each man drafted for three months last August for ye Northern Campaign what they pay respectively for hiring of men.

"They then chose Mr. Joseph Roberts moderator for the meeting.

"1. Voted to act upon the constitution and form of government sent for their consideration.

"2. Voted to choose a committee of nine men and nominations being called for the following gentlemen were named: * * *

"3. Voted that the above committee take under consideration the plan of government *and make a report to the Town at the time of their adjournment.*

[Three other objects were considered and voted upon.]

"Voted to adjourn to June 8th at 3 o'clock."

Agreeable to the adjournment the inhabitants met and voted as follows:

"For the approbation of ye Constitution of Government..... 6
"Against it or disapprobation.....57"

This rejection of the proposed constitution of Massachusetts by the people of Weston was a fair sample of what was done in the other towns. *The people of Massachusetts vetoed the proposed system of State government and by 5 to 1 vote, for there were no limitations upon the Legislature—no Bill of Rights.* All Anglo Saxons had possessed Bills of Rights from about the year 100 A. D., and here in Massachusetts only a hundred years ago the people preserved their ancient liberties through the direct-vote system.

In 1780, two years after the Massachusetts' people vetoed the proposed constitution, they secured the submission of a splendid one and adopted it. The manner of its adoption in the township of Weston is described as follows in the minutes of the town clerk:

> "At a meeting of the freeholders and other inhabitants of the Town of Weston that were by law qualified to vote in Town affairs in public town meeting assembled on Monday the 6th day of March A. D. 1780—
>
> * * *
>
> "8. To hear the account of the Delegate chosen by the Town to attend on the convention to form a new Constitution of Government *and act thereon—*"

The hearing of the report was deferred, but on May 15th a meeting was held—

> "1. To hear and act upon a Constitution or Form of Government *agreed upon by the delegates of the people of the State of Massachusetts Bay.*"

The town clerk's minutes further show—

> "1. Voted not to choose a committee to act upon the constitution.

"2. *Voted to accept the Constitution and Form of Government as it now staands, but it is our opinion that it should be revised within ten years and made certain. Yeas* 54, *nays* 20."

In the North Carolina Colonial Records there are re-published the following instructions:

"At a general Conference of the inhabitants of Mecklenberg, assembled at the Court house on the first of November, 1776, for the express purpose of drawing up instructions for the present representatives in Congress the following were agreed to by the assent of the people present and ordered to be signed by John M. Alexander, Chairman chosen to preside for the day in said Conference.

"To Waightsill Avery, Hezekiah Alexander, John Phifer, Robert Erwin, and Zacheus Wilson, Esquires:

"Gentlemen: You are chosen by the inhabitants of this country to serve them in Congress or General Assembly for one year *and they have agreed to the following instructions which you are to observe with the strictest regard, viz: You are instructed:*

"1. That you shall consent to and approve the Declaration of the Continental Congress declaring the thirteen United States Colonies free and independent States."

Eighteen additional paragraphs of instructions by the people follow, including one for a Bill of Rights in the proposed constitution of the State; and that the instrument be referred to the people for adoption. (Vol. 10, Colonial Records of North Carolina, 870 *a*.)

In Orange County, North Carolina, the instructions to the delegates were as follows:

"We, the people of the County of Orange, who have chosen you to represent us in the next Congress of Representatives delegated by the people of this State *require you take notice that the following are our instructions to you which you are required to follow in every particular with strictest regard.*"

Vol. 10, Colonial Records of North Carolina, 870 f.

These instructions were in 1776.

Proof that in 1787 in North Carolina and in the other twelve States the delegates who were elected to the State Conventions to consider and act upon the proposal to adopt the Federal Constitution *were instructed* is the evidence that has been collected by Mr. O. G. Libby of Wisconsin University, referred to in a preceding page.

Reviewing this section it is clear that at the time of the adoption of the Federal Constitution in 1787 the representatives were Delegates and not Rulers.

Fallacious Arguments by Holders of Special Privilege.

Today, nearly a century after the people of this country had ceased to instruct at town meetings and county conferences because a better system had existed for a time, namely, party conventions, *the few who have secured special privileges and therefore are intent on preventing the restoration of the people's rule are declaring that representative government in this country is a system wherein the few men in office are not delegates but are rulers.* Among other things they attempt to prove it by quoting from Edmund Burke's speech to his constituents, in 1780, *but they conceal the further fact that his constituents refused to re-elect him, thereby maintaining their right to instruct.* Burke's speech, in which he withdrew from the contest on election day, even before the ballots were all cast, is published in the same volume from which our opponents quote, but they carefully refrain from mentioning it. In Bell and Sons' edition of Burke's speeches in Vol. II, p. 170, in declining the poll Burke said:

> "I have not canvassed the whole of this city in form. But I have taken such a view of it as satisfies my own mind, that *your choice will not ultimately fall on me.* * * * *I confided, perhaps, too much in my intentions.* They were really fair and upright; and I am bold to say, that I ask no ill thing for you, when on parting from this place I pray that whomever you choose to

succeed me, he may resemble me exactly in all things, except in my abilities to serve, and my fortune to please you."

Basis of Right to Instruct.

The people's unquestioned right to pledge representatives to obey instructions is a consequence of their right to elect to office. In the words of John Stuart Mill in Representative Government, Chapter XII:

> "Let the system of representation be what it may, *it will be converted into one of mere delegation if the electors so choose.* As long as they are free not to vote, and free to vote as they like, they cannot be prevented from making their vote depend on any condition they think fit to annex to it. By refusing to elect any one who will not pledge himself to all their opinions, and even, if they please, to consult with them before voting on any important subject not foreseen, they can reduce their representative to their mere mouthpiece or compel him in honor, when no longer willing to act in that capacity, to resign his seat."
>
> Quoted in The Platform, Its Rise and Progress, by Henry Jephson, Vol. II, page 434.

A review of this section will clearly demonstrate that at the time of the adoption of the Federal Constitution the government in the several States was such that the legislative representatives were Delegates and not Rulers.

In other words, the people in the several States possess a legal right to rule through Representative Government (Party Government) and they doubtless will so rule when the system is properly constructed.

And right here we wish to point to a most important fact.

PEOPLE'S DIRECT-VOTE SYSTEM IS CONSERVATIVELY PROGRESSIVE.

Party government in combination with a direct power in the voters through the Initiative and the Referendum is a more conservative system than is mere party government where it represents the people's interests. *History demonstrates that the people are conservatively progressive as compared with their real representatives in office,* the reason being that the real representatives devote practically all of their time to the study of human progress and they see the need for changing the laws before the people have become educated to it. Under the Initiative and the Referendum system the representatives are obliged to secure the people's consent before the constitution can be altered or new laws placed upon the statute books. *The presence of this veto power in the people necessitates the education of the people, who are self-governing under progressive leadership; whereas under the rule of the few who are in office the tendency at the present stage of human development is the retention of special privileges—the robbery of the many by the few. But under a system of self-government the citizens protect themselves; self-interest causes them to prevent a continuance of privileges conferred by law.*

For sixty years the voters in this country were a self-governing people, and they gradually abolished special privileges, resulting in a glorious civilization, described in DeTocqueville's "Democracy in America," quoted at pages 16-17 above.

REVIEW AND CONCLUSION.

A few years after DeTocquiville visited this country the people of the United States gradually lost to a considerable extent the system of self-government, as pointed out by Cal-

houn and Benton (pages 8, 11, 12 above), and for many years the people were so engrossed with the slavery question, with civil war, with reconstruction, and with industrial development, that the machine-rule system, under the guise of the people's rule, was tolerated. But the lifting of the veil in Bryce's "American Commonwealth," followed by publicity of machine-rule methods, has aroused a large proportion of the American people. They are thoroughly aroused, more so than when the British passed the Stamp Act against the Colonists and began to encroach upon their liberties. In both the great political parties there is a movement that has caused the National House of Representatives to reconstruct its procedure; and has caused Congress to rigidly provide for publicity for campaign contributions, and to expressly consent to the retention of the Initiative system in the Arizona Constitution.

We respectfully suggest that the rule laid down in Marbury vs. Madison, that the Judicial Department will not trench upon the other co-ordinate departments, should be adopted as the rule in this case; and especially do we urge the rule laid down in Luther vs. Borden and by the present Congress, that the determination of whether or not a State has a Republican form of government is for Congress—the political department. If this view is correct, then this case from Oregon should be dismissed for lack of jurisdiction.

Respectfully submitted,

George H. Shibley,
Robert L. Owen,
J. Harry Carnes,
Counsel for the State of Washington, which prays to be heard as amicus curiæ;
Of Counsel for the State of Oregon.

No. 36.

Office Supreme Court, U. S.
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JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 19[redacted]

PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY (A CORPORATION),
Plaintiff in Error,

v.

STATE OF OREGON,
Defendant in Error.

BRIEF SUBMITTED BY PERMISSION OF THE COURT BY

JOHN T. DYE,
ADDISON C. HARRIS.

WM. B. BURFORD, PRINTER, INDIANAPOLIS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1908.

PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY (A CORPORATION),
Plaintiff in Error,
v.
STATE OF OREGON,
Defendant in Error.
No. 822.

First thanking the Court for the gracious permission extended to us to submit a short brief herein, we premise by saying that we have no purpose to go over the ground at length so fully covered by the learned briefs heretofore filed, but merely to invite the attention of the Court to the constitutions of the original States and ascertain where the legislative power was vested at the time the people adopted the federal constitution. And also to point out briefly the action of the Congress, both before and after that time. These, it is thought, help to furnish the definition had in the minds of the people concurrently with their declaration that "the United States shall guarantee to every State in this Union a republican form of government."

And we venture to add a few words by way of argument in support of the contention of Plaintiff in Error that the amendment of the Oregon constitution under consideration is in conflict with the Constitution of the United States, p. 19; and further, that the question presented upon the record is a judicial question, pp. 23-27.

THE FEDERAL CONSTITUTION.

I. REQUIRES THAT EVERY STATE SHALL HAVE A LEGISLATURE.

The Constitution of the United States requires that every State shall have a legislature:

1st. To choose United States senators. (Art. 1, §§3 & 4.)

2d. To appoint in such manner as the legislature may direct presidential electors. (Art. 2, §1.)

3d. To consent to the junction of two or more States or parts of States. (Art. 4, §3.)

4th. To make application to the United States to suppress domestic violence. (Art. 4, §4.)

5th. That the legislatures of the States may cause a convention to sit for proposing amendments to the United States Constitution; and to ratify such amendments. (Art. 5.)

And Lastly. The members of the several State legislatures must take an oath to support the Constitution of the United States.

It is self-evident that a State cannot exist within the Union without a legislature. A legislature under the Constitution is necessary in order to be a Republican state; and so when the Constitution declares: "The United States shall guarantee to every State in this Union a Republican form of government," it declares the States must have legislatures. It follows that the States are prohibited from abolishing legislatures. They must maintain them intact.

What was the intent of the people when they adopted the Constitution by the clause "The United

States shall guarantee to every State in this Union a Republican form of government?" When we ascertain the part the legislatures of the several States then performed in the maintenance of the governments of the States, it will be disclosed that the supreme legislative power of the States was vested in the legislatures. It seems worth while to examine the constitutions of the eleven States which adopted constitutions between the Declaration of Independence and the adoption of the federal constitution by the people, and the charters of Rhode Island and Connecticut which remained their constitutions under the Federal constitution.

II. THE LEGISLATIVE POWER WAS VESTED ALONE IN THE LEGISLATURES OF THE ORIGINAL STATES

New York.—The Constitution of New York, adopted in April, 1777, was written by John Jay. In the preamble is set forth the resolution of the Congress "that it be recommended to the respective assemblies and conventions of the united colonies where no government sufficient to the exigencies of their affairs has been hitherto established, to adopt such government as shall in the opinion of the representatives of the people best conduce to the happiness and safety of their constituents in particular, and America in general." (Vol. 5, American Charters, Constitutions, etc., by Thorpe, page 2623, *et seq.*)

Article 2 of that Constitution reads as follows: "This convention doth further in the name and by the authority of the good people of this State ordain, determine, and declare that the supreme leg-

islative power within this State shall be vested in two separate and distinct bodies of men; the one to be called the Assembly of the State of New York, the other to be called the Senate of the State of New York; who togther shall form the legislature and meet once at least in every year for the despatch of business." (Ib. p. 2628.)

Article 31 enacts that the style of all laws shall be as follows, to wit:

"*Be it enacted by the people of the State of New York represented in Senate and Assembly:*" * * *. (Italics not ours.)

Virginia (1776.)—Section 7 of the Bill of Rights declares: "That all power of suspending laws or the execution of laws by any authority without consent of the representatives of the people is injurious to their rights and ought not to be exercised." (7 Thorpe, p. 3813.)

Section 15 of the Bill of Rights declares: "That no free government or the blessings of liberty can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by a frequent recurrence to fundamental principles."

And in the body of the Constitution (Id., p. 3815) it is declared "and in compliance with a recommendation of the General Congress (we) do ordain and declare the future form of government to be as followeth: The legislative, executive and judiciary departments shall be separate and distinct * * *. The legislative shall be formed of two distinct branches who together shall be a complete leg-

islature. They shall meet once or oftener every year and shall be called the General Assembly of Virginia. One of these shall be called the House of Delegates * * * the other shall be called the Senate * * *."

Pennsylvania (1776), (5 Thorpe, 3081).—Section 14 of the Bill of Rights reads: "That a frequent recurrence to fundamental principles and a firm adherence to justice, moderation, temperance, industry, and frugality, are absolutely necessary to preserve the blessings of liberty and keep a government free. The people ought therefore to pay particular attention to these points in the choice of officers and representatives, and have a right to exact a due and constant regard to them from their legislatures and magistrates in the making and executing such laws as are necessary for the good government of the State."

Section 16 of the Bill of Rights declares: "That the people have a right to assemble together, to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances, by address, petition, or remonstrance."

Section 2 of the Constitution declares: "The supreme legislative power shall be vested in a house of representatives of the freemen of the commonwealth or State of Pennsylvania." (Ib., p. 3084.)

In November, 1789, a second convention framed a second constitution which took effect in 1790. Section 1 of Article 1 reads: "The legislative power of this commonwealth shall be vested in a General

Assembly which shall consist of a Senate and a House of Representatives." (Ib., p. 3092.)

New Jersey (1776), (5 Thorpe, p. 2594).—The preamble refers to the resolution of the Congress and recites "that the representatives of the colony of New Jersey having been elected by all the counties in the freest manner, and in congress assembled, have after mature deliberation agreed upon a set of charter rights and a form of a constitution in manner following, viz.:

"Article 1.—That the government of this province shall be vested in a governor, legislative council and general assembly."

Article 5 enacts "that the assembly when met shall have power to choose a speaker and other their officers; * * * prepare bills to be passed into laws * * *."

Article 6 provides "that the council shall also have power to prepare bills to pass into laws, and have other like powers as the assembly, and in all respects be a free and independent branch of the legislature of this colony."

Article 15 declares "That the laws of the colony shall begin in the following style, viz: 'Be it enacted by the Council and General Assembly of this Colony, and it is hereby enacted by authority of the same."

Maryland (1776), (3 Thorpe, p. 1686).—Article 10 of the Bill of Rights: "That for redress of grievances and for amending, strengthening and preserving the laws, the legislature ought to be frequently convened."

Article 11, Bill of Rights: "That every man hath a right to petition the legislature for the redress of grievances in a peaceable and orderly manner."

Article 1 of the Constitution declares: "That the legislature consist of two distinct branches, a Senate and a House of Delegates which shall be styled the General Assembly of Maryland."

The 10th and 11th articles authorize the House of Delegates and the Senate to originate bills and pass laws, etc. And Section 57 declares: "That the style of all laws run thus: 'Be it enacted by the General Assembly of Maryland;' * * *."

North Carolina (1776), (5 Thorpe, p. 2787).—Article 4 of the Bill of Rights declares: "That the legislative, executive and supreme judicial powers of government ought to be forever separate and distinct from each other."

Articl 18 thereof: "That the people have a right to assemble together to consult for their common good, to instruct their representatives and to apply to the legislature for redress of grievances."

The preamble then following recites the resolution of the Congress as authority for making a constitution, and continues: "Wherefore in our present state in order to prevent anarchy and confusion, it becomes necessary that government should be established in this State; therefore, we the representatives of the freemen of North Carolina, chosen and assembled in congress for the express purpose of framing a constitution under the authority of the people, most conducive to their happiness and prosperity, do declare, that a govern-

ment for this State shall be established in manner and form following, to wit:

"Article 1. That the legislative authority shall be vested in two distinct branches both dependent on the people, to wit: a Senate and a House of Commons.

"Article 2. That the Senate shall be composed of representatives annually chosen by ballot * * *."

"Article 3. That the House of Commons shall be composed of representatives annually chosen by ballot * * *."

"Article 4. That the Senate and House of Commons assembled for the purpose of legislation shall be denominated the General Assembly.

"Article 10. That the Senate and House of Commons when met, shall * * * sit upon their own adjournments from day to day; and prepare bills to be passed into laws.

"Article 44. That the Declaration of Rights is hereby declared to be part of the Constitution of this State and ought never to be violated on any pretense whatsoever."

Delaware (1776), (1 Thorpe, p. 562).—Article 2 declares: "The legislature shall be formed of two distinct branches. They shall meet once or oftener in every year and shall be called the General Assembly of Delaware."

Article 3. "One of the branches of the legislature shall be called the House of Assembly * * *."

Article 4. "The other branch shall be called the Council * * *."

Article 5 declares the members of both houses shall be elected and so forth "and they shall have all other powers necessary for a legislature of a free and independent State."

Massachusetts (1780), (3 Thorpe, 1888).—Article 1 declares: "The department of legislation shall be formed by two branches, a Senate and House of Representatives; * * * and shall be styled the 'General Court of Massachusetts.'"

Article 2 provides: "No bill or resolve of the Senate or House of Represntatives shall become a law and have force as such until it shall have been laid before the governor for his revisal; and if he, upon such revision, approve thereof, he shall signify his approbation by signing the same. * * *."

Then follows a provision that in case of veto two-thirds of each branch voting for the same, the bill shall have the force of law.

Article 4 declares: "And further, full power and authority are hereby given and granted to the said General Court from time to time to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this Constitution * * *."

New Hampshire (1776).—This was intended to be a temporary constitution but declared that no act or resolve shall be valid and put into execution unless agreed to and passed by both branches of the legislature. (4 Thorpe, pp. 2451-2.)

(1784).(4 Thorpe, p. 2453).—Article 32 of the Bill of Rights declares "the people shall have a right in orderly and peaceable manner to assemble and consult upon the common good, give instructions to their representatives; and to request of the legislative body by way of petition or remonstrance redress of the wrongs done them, and of the grievances they suffer."

Part II declares, under the title of "General Court":

"The supreme legislative power within this State shall be vested in the Senate and House of Representatives * * *."

And "full power and authority are hereby given and granted to the said General Court from time to time to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions and instructions, either with penalties or without, so as the same be not repugnant or contrary to this Constitution as they may judge for the benefit and welfare of this State, and for the governing and ordering thereof, and of the subjects of the same, for the necessary support and defence of the government thereof; * * *." (Page 2458.)

South Carolina (1778), (6 Thorpe, p. 3248).—Article 2 declares: "That the legislative authority be vested in a General Assembly to consist of two distinct bodies, a Senate and House of Representatives."

Georgia (1777), (2 Thorpe, p. 777).—The preamble recites the resolution of the Congress, and the Declaration of Independence; and

Article 2 declares: "The legislature of this State shall be composed of the representatives of the people as hereinafter pointed out * * *."

This constitution was followed by the second which was framed by a convention which met January 4, 1789. (2 Thorpe, p. 785.)

Section 1, article 1, declares: "The legislative power shall be vested in two separate and distinct branches, to wit: a Senate and House of Representatives, to be styled the General Assembly."

Section 16 declares: "The General Assembly shall have power to make all laws and ordinances which they shall deem necessary and proper for the good of the State, which shall not be repugnant to this Constitution."

Connecticut and *Rhode Island,* having free charters, continued thereunder their state governments until 1818 and 1842. (See Charter of Connecticut, 1662, 1 Thorpe 529; Charter of Rhode Island, 1663, 6 Thorpe, p. 3211.)

The Connecticut charter declared *inter alia* that the colonial legislative body have power "from time to time to make, ordain and establish all manner of wholesome and reasonable laws, statutes, ordinances, directions and instructions not contrary to the laws of this realm of England, as well for settling the forms and ceremonies of government and magistracy fit and necessary for the said plantation, and the inhabitants there, as for naming and styling all sorts of officers, both superior and in-

ferior, which they shall find needful for the government and plantation of the said colony," etc. (Ib., p. 533.)

The Rhode Island charter creates a legislative body called a "Generall Assemblye" to whom are granted power "from tyme to tyme, to make, ordeyne, constitute or repeal, such lawes, statutes, orders and ordinances, formes and ceremonies of government and magistracye as to them shall seeme meete for the good and wellfare of the sayd Company," etc. (Ib., page 3215.)

It would seem that the people of the United States, when adopting the present Constitution, commonly understood that state statutes must be enacted by representatives sitting as a legislative body. This is confirmed by section 1, article 1, of the Federal Constitution, which declares: "All legislative power herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives." There was no thought of a plebiscite to enact or repeal statutes.

John Jay, we have seen, clearly expressed the thought of the time in the words: "The supreme legislative power within this State is vested in the legislature." A power vested in another cannot be exercised by the grantor. And as the people in no one of the original States in 1787 had the power outside of the legislature to enact statutes but that power reposed in their legislative bodies, it seems to follow that Jay expressed the general thought of the time in the phrase, "Be it enacted by the people of New York *represented* in Senate and Assembly."

III. ORDINANCE OF 1787.

This view is supported by the legislation of the Commonwealth of Virginia and the Congress concerning the territory northwest of the river Ohio. This land was taken from Great Britain by General George Rogers Clark, an officer commissioned by the State of Virginia. And so by international law, this land became the property of Virginia. But inasmuch as the land was won from a common enemy in a common cause, the legislature of Virginia on December 20, 1783, authorized the delegates of that State in Congress to convey to the United States in Congress "all the right of this commonwealth to the territory northwestward of the river Ohio." In the grant Virginia stipulated the conveyance was "upon condition that the territory so ceded shall be laid out and formed into States * * * and that the States so formed shall be *distinct Republican states* and admitted members of the Federal Union." In pursuance of that act, that State transferred to the United States by deed signed by Thomas Jefferson, Samuel Hardy, Arthur Lee, and James Monroe, then delegates in Congress, all this land. (See Vol. 1, p. 472, United States Laws.) (Our italics.)

The Congress on July 13, 1787, ordained what is commonly known as "The Ordinance of 1787." In this ordinance provision is made, *first*, for the temporary government of this land. The ordinance provides for a legislative Council and a House of Representatives who "shall have authority to make laws in all cases for the good government of the dis-

trict not repugnant to the principles and articles in this ordinance established and declared." This body is mentioned as the "General Assembly or Legislature," and when a bill is passed by a majority in each house, it is then referred to the governor for his assent or dissent.

Second. Provision is then made for the permanent government of this land. The ordinance *inter alia* declares:

"And for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws, and constitutions, are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory; to provide, also, for the establishment of States and permanent government therein, and for their admission to a share in the federal councils, on an equal footing with the original States, at as early periods as may be consistent with the general interest:

"It is hereby ordained and declared, by the authority aforesaid, That the following articles shall be considered as articles of compact between the original States, and the people and States in the said territory, and forever remain unalterable, unless by common consent, to wit:

"Art. 2. The inhabitants of the said territory shall always be entitled to the benefit of the writ of habeas corpus, and of the trial by jury; of a *proportionate representation of the people in the legislature,*

and of judicial proceedings according to the course of the common law. * * * (Italics ours.)

"Art. 4. The said territory, and the States which may be formed therein, shall forever remain a part of this confederacy of the United States of America, subject to the articles of confederation, and to such alterations therein as shall be constitutionally made, * * *."

"Art. 5. There shall be formed in the said territory not less than three nor more than five States; * * *. And whenever any of the said States shall have sixty thousand free inhabitants therein, such State shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original States, in all respects whatever; and shall be at liberty to form a permanent constitution and state government: *provided the constitution and government, so to be formed, shall be Republican, and in conformity to the principles contained in these articles;* and, so far as it can be consistent with the general interest of the confederacy, such admission shall be allowed at an earlier period, and when there may be a less number of free inhabitants in the State than sixty thousand." (Italics ours.)

In brief each State to be distinctly Republican must have a legislature to enact laws for the people.

Tennessee.—It may be noted that in the cession by the State of North Carolina to the United States of the land now Tennessee, the provisions of the ordinance of 1787 are made applicable thereto. (6 Thorpe, p. 3409, foot of page 3411.)

Kentucky.—The Act of Congress of 1790 for the government of the territory of the United States south of the river Ohio makes the ordinance of 1787 a part thereof. (3 Thorpe, p. 1263.)

The act of Congress of April 19, 1816, authorizing the people of the Territory of Indiana to form a constitution and state government declared that the convention upon being organized "shall then form for the people of said territory a constitution and state government; provided that the same whenever formed shall be republican and not repugnant to those articles of the Ordinance of the 13th of July, one thousand seven hundred and eighty-seven, which are declared to be irrevocable between the original States and the people and States of the territory northwest of the river Ohio * * *." (Sec. 4 of the Act.)

The constitutional convention sitting to establish the State of Indiana on June 29, 1816, by ordinance declared "That we will and do hereby accept the propositions of the Congress of the United States as made and contained in their act of the 19th day of April, 1816 * * *. And we do moreover for ourselves and our posterity hereby declare and ordain that this ordinance and every part thereof shall forever be and remain irrevocable and inviolate without the consent of the United States in Congress assembled first had and obtained for the alteration thereof or any part thereof." (See these Acts and Ordinances collected in the Indiana Revised Statutes of 1843, from page 16 to page 37.)

It thus appears that the Congress of 1787 in de-

claring the form of government for the new States and providing for proportionate representation of the people in the legislatures thereof had in mind the same form of governemnt for the future "distinct republican States" as then existed in the original States, which we have seen had legislatures to whom was granted all supreme legislative power in the enactment of laws. And it is such form of state government we submit that the peole had in mind when they ordained that the United States shall guarantee to every State in this Union a republican form of government.

We have thought it not improper to lay these historical facts before this Honorable Court, as they seem to show that the people then understood that in our republican form of government the supreme legislative power was exercised by representatives in General Assemblies. And we trust that it is not improper to mention that a case is now pending in the Supreme Court of Indiana in which is involved the question whether initiative and referendum legislation can be authorized in this State in the face of the Ordinance of 1787 and the Constitution of the United States. It must be conceded by everyone that a legislature has no essential part in the enactment of laws under the initiative and referendum. The bill might as well be delivered to the Secretary of State and by him sent to the people at the next election without any action of the General Assembly. Under this mode the General Assembly could be abolished except as it is required to exist to do the things stated on page 3, *supra*. It cannot

be that the people when adopting the Constitution thought that there could be a State without a legislature; or having a legislature it could be stripped of all state legislative power.

IV. THE FORM OF GOVERNMENT BY THE INITIATIVE AND THE REFERENDUM, AS SET FORTH IN THE OREGON CONSTITUTIONAL AMENDMENT, OF WHICH A COPY IS PRINTED IN THE BRIEF OF MR. PILLSBURY, IS IN CONFLICT WITH THE REPUBLICAN FORM OF GOVERNMENT GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES.

The initiative means direct legislation by the people.

The referendum means control at the polls of the action of the legislature in making laws.

"This form of government," to adopt the language used by one of its earnest advocates, "is absolute popular government." It is government by the numerical majority directly, and not through representatives. It is not a government of all for all, and by the wisest and best selected by all. It gives, absolutely, the control of legislation to mere numbers, and defeats the method which civilization has developed, by which it utilizes experience, character and wisdom in the selection of its lawmakers. It prevents the opportunity for deliberation and discussion necessary to the formation of the public will, and to its expression as the law of organized society. It takes away the security against wrong and oppression which is secured by true representation, where the representative is a trustee for the benefit of the whole people. It weakens, and in some instances destroys the guards and checks and

balances by which the historic rights, which we call natural, are protected, under a republican form of government.

Under this "absolute popular government" there is nothing to stay or check the destructive power of the waves of ignorance, or prejudice, or passion, which sometimes sweep over the surface of society. The bulwarks provided by constitutional government, are swept away. The power of the majority is absolute.

The most important contribution made by any people to the science of government is representative democracy, with its institutions, guaranties, checks and balances, and division of power, worked out by the English-speaking people, and adopted by the States before the formation of the Federal Constitution, and organized in the Federal Constitution itself, and guaranteed to the States. No greater change could be made in our institutions than by its abandonment.

James Wilson, one of the most active and influential members of the Constitutional convention, said:

> "The *Constitution of the United States*, and that of Pennsylvania, *rest solely and in all their parts, on the great democratic principle of the representation of the people.* In other words, on the moral principle known by the name of State. This great principle necessarily draws along with it the consideration of another principle equally great—the principle of free and equal elections. To maintain in purity and vigor this important principle, whose energies should pervade the

most distant parts of the government, is the duty and ought to be the first care of every free State. Let me, by the way, be indulged in repeating the remark which was made and fully illustrated in a former lecture, that *government founded solely on representation made its first appearance on this and not on the European side of the Atlantic.*" [Italics ours.]

Wilson's Works, Vol. 2, p. 9.

In the Federalist (No. 63, p. 5), James Madison said:

> "*The difference most relied upon, between the American and other republics, consists in the principle of representation, which is the pivot upon which the former moves,* and which is supposed to be unknown to the latter, or, at least, to the ancient part of it."

And on page 6 it is said:

> "The *true distinction* between these (the ancient so-called republics) and the American government, *lies in the total exclusion of the people in their collective capacity, from any share, in the latter,* and not in the total exclusion of the representatives of the people from administration, in the former."

The republics of the United States and the government of the United States, itself, have all been organized upon the basis of representative government. Representation is one of the elements of a republican form of government, by which it is distinguished from absolute popular government. The absolute popular government of Oregon differs from

the composite, specialized republican form of government, with its checks and balances and guaranties and limitations of power, adopted in the Constitution of the United States, and guaranteed to every State as much as any government could. The two forms of government are utterly inconsistent.

A government by initiative and referendum is more akin to the ancient, so-called republics of Greece, than it is to republican government as established by the Constitution of the United States and guaranteed to the States.

It is urged that the people are sovereign. This is conceded by all. But English speaking people have learned, through a long and painful struggle, that it is necessary to provide guards and guaranties as a protection against the abuse of power by the government and by themselves.

> "The majority has no natural and jural right to control the minority, for when two antagonistic interests exist in a State, to give the control to that which has a majority of votes, would give the right to destroy the other for its own benefit."
>
> Tucker, on the Constitution, page 71.

Under a representative form of government the abuse of power by the majority is guarded against by checks and balances and guaranties, by the opportunity for deliberation and discussion which it insures, by the principle which imposes upon the representative a trust for the benefit of the whole Under an absolute popular government, legislation becomes a mere contest between opposing interests,

uncontrolled by any checks or guaranties, without any opportunity for delay or discussion, or deliberation, and with the salutary influence of the principle that the representative is a trustee for all.

But it is urged that "the power to determine whether a State has a republican form of government is vested in Congress, and hence is a political, rather than a judicial question."

It was said, in *Marbury* v. *Madison* (1 Cranch 177):

> "The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls, any legislative act repugnant to it; or that the legislature may alter the Constitution by an ordinary act. * * * If an act of the legislature repugnant to the Constitution is void, does it, notwithstanding its validity, bind the courts and oblige them to give it effect? * * * This would be to overthrow, in fact, what was established in theory; and would seem, at first view, an absurdity too gross to be insisted upon. * * * If, then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply. Those, then, who controvert the principle that the Constitution is to be considered in Court as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitu-

> tion, and see only the law. This doctrine would subvert the very foundation of all written constitutions; it would declare that an act which, according to the principles and theory of our government, is entirely void, yet, in practice, is completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence; with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits and declaring that those limits may be passed at pleasure."

This reasoning applies with as much force to the provision of a state constitution, as it does to an act of Congress, or of a legislature.

The Constitution of the United States is supreme, not only over Congress and State legislatures, but also over State constitutions, and if any provision in a State constitution conflicts with the supreme organic law, when a case involving civil rights is presented to the court, it must follow the supreme organic law, and not the provisions of a State constitution in conflict with it.

The case of *Luther* v. *Borden*, cited by counsel for Defendants in Error, involved the question as to which of two opposing governments was the legitimate one, viz, the charter government, or the government established by a voluntary convention, and did not involve the question in this case, whether a provision of the State Constitution was in conflict with the Constitution of the United States.

Taylor v. *Beckham*, 178 U. S. 609, involved no question as to the conflict between a provision of a State Constitution and the Constitution of the United States; and in that case Chief Justice Fuller, in delivering the opinion, said:

> "As remarked by Chief Justice Taney, in *Luther* v. *Borden*, 'the high power has been conferred upon this Court, of passing judgment upon the acts of State sovereignties, and of legislative and executive franchises of the Federal Government, and of determining whether they are beyond the limits of powers marked out for them respectively by the Constitution of the United States.' " (Page 902.)

The fact that Congress has power to determine for itself the political question whether the Constitution of a State is republican in form, before admitting it into the Union, does not exclude the power of this Court to determine when the question arises in a judicial controversy whether an amendment to a constitution made after a State has been admitted into the Union is in conflict with the Constitution of the United States. Neither does it conclude this Court, when the question arises in a proper case, from determining whether the Constitution of a State is in conflict with the Constitution of the United States.

Article 4, Section 4, of the Constitution provides that "The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be con-

vened), against domestic violence." When a State has been admitted, it becomes a part of an "indissoluble union of indestructible States." The power of Congress over it under this section, is limited to protecting it against invasion or, on application of the legislature or the executive (when the legislature cannot be convened), against domestic violence.

The action of Congress does not give any validity to clauses in a State Constitution which are in conflict with the Constitution of the United States. When a judicial controversy arises in any court involving civil rights, the court must decide what law governs, whether the Constitution of the United States or the Constitution of a State.

As was said by the Court in *Gunn* v. *Barry*, 15 Wallace 610, 623; as to the State of Georgia:

> "Though her Constitution was sanctioned by Congress, this provision can in no sense be considered an act of that body. The sanction was only permissive as a part of the process of her rehabilitation, and involved nothing affirmative or negative beyond that event. If it were express and unequivocal, the result would be the same. Congress cannot, by authorization or ratification, give the slightest effect to a state law or constitution in conflict with the Constitution of the United States. That instrument is above and beyond the power of Congress and the States, and is alike obligatory upon both."

Besides Congress has never passed upon this amendment to the Oregon Constitution. There is

no way in which it can pass upon it. The political question of the admission of Oregon into the Union was decided when the State was admitted into the Union, but the admission of the State conferred no right upon the State of Oregon to amend its Constitution by inserting provisions in conflict with the Constitution of the United States.

Respectfully submitted,

JOHN T. DYE.
ADDISON C. HARRIS.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 36.

PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF OREGON.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

Statement of Case.

This is a suit instituted by the State of Oregon in Multnomah County, against the plaintiff in error, for the sum of $10,450 unpaid taxes, levied pursuant to an initiative law passed by the people June 4, 1906, and promulgated June 25, 1906, levying a license tax of two per centum upon the gross receipts of express, telephone, and telegraph companies, and being chapter one of the laws of 1907. Such

gross receipts beginning June 26, 1906, and ending December 31, 1906, were $475,031, calling for a tax of $9,500.62, to which for failure to make payment within thirty days after the filing of the statement required by law with the State Treasurer there was added a penalty of ten per cent, or $950.06, for the total of which suit was brought.

Several defenses were interposed by the defendant in the circuit court, the principal one relied upon being that the initiative and referendum was unconstitutional under the Constitution of the United States. The answer embodying these defenses was demurred to by the State and the demurrer sustained, whereupon the defendant elected to stand by the demurrer, and judgment was given for the State. Upon appeal to the Supreme Court of the State the judgment of the lower court was sustained, and from such judgment an appeal upon the Federal question thus raised was taken to this court.

From the assignments of error it appears that the plaintiff in error contends that the initiative and referendum provision is unconstitutional in that by it the people assume legislative power contrary to the following provisions of the Federal Constitution: Article I, section 21, clause 1, declaring that electors for the House of Representatives shall have the qualifications requisite for electors for the most numerous branch of the State legislature; Article I, section 3, providing for the choosing of United States Senators by the legislature; Article I, section 4, providing that the legislature should prescribe the times, places, and manner of holding elections for Senators and Representatives; Article I, section 8, clause 17, providing that Congress should have power to exercise exclusive legislation over places purchased by consent of the State legislature for erection of forts, etc.; Article II, section 1, clause 3, providing for appointment as the legislature might direct of electors; Article IV, section 3, providing for consent of legislatures for formation of new States out of old; Article IV, section 4, guaranteeing to every State a

republican form of government, protecting them against invasion, and, on application of the legislature, or of the governor if the legislature cannot be convened, against domestic violence; Article V, providing for the calling of constitutional conventions on the application of State legislatures and ratification of amendments by legislatures; Article VI, providing the constitution and laws of the United States made in pursuance thereof, and treaties made under the authority of the United States should be supreme and judges bound thereby, and that members of the legislatures, etc., should be bound to support the Constitution; XIV Amendment, section 1, providing *inter alia* against a State making or enforcing any law abridging privileges or immunities of citizens of the United States, etc.

Error was also alleged in the holding that the act making the initiative and referendum effective was not contrary to and in violation of the implied provision of the Constitution that the governments of the several States should be representative, and that they should create and maintain representative legislative assemblies.

The decision of the Supreme Court was also claimed to be erroneous as contrary to the act admitting Oregon to the Union—receiving her on an equal footing with the other States in all respects whatever.

ARGUMENT.

It is evident from a consideration of the assignments of error that two main points are sought to be raised:

1. Is the initiative and referendum consonant with a republican form of government?

2. Is the initiative and referendum unconstitutional as being derogatory to the rights of the legislatures as recognized by the Federal Constitution?

WHAT IS MEANT BY THE "INITIATIVE AND REFERENDUM."

Before discussing these questions, let us first consider what is meant by the phrase. The literal answer is found in section 1 of Article IV of the Constitution of Oregon, adopted in June, 1902 (Record, p. 4).

> "The legislative authority of the State shall be vested in a legislative assembly, consisting of a senate and house of representatives, but the people reserve to themselves power to propose laws and amendments to the Constitution and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly. The first power reserved by the people is the initiative, and not more than eight per cent of the legal voters shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the Secretary of State not less than four months before the election at which they are to be voted upon. The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health, or safety) either by the petition signed by five per cent of the legal voters, or by the legislative assembly, as other bills are enacted. Ref-

erendum petitions shall be filed with the Secretary of State not more than ninety days after the final adjournment of the session of the legislative assembly which passed the bill on which the referendum is demanded. The veto power of the Governor shall not extend to measures referred to the people. All elections on measures referred to the people of the State shall be had at the biennial regular general elections, except when the legislative assembly shall order a special election. Any measure referred to the people shall take effect and become the law when it is approved by a majority of the votes cast thereon, and not otherwise. The style of all bills shall be: 'Be it enacted by the people of the State of Oregon.' This section shall not be construed to deprive any member of the legislative assembly of the right to introduce any measure. The whole number of votes cast for justice of the supreme court at the regular election last preceding the filing of any petition for the initiative or for the referendum shall be the basis on which the number of legal voters necessary to sign such petition shall be counted. Petitions and orders for the initiative and for the referendum shall be filed with the Secretary of State, and in submitting the same to the people he, and all other officers, shall be guided by the general laws and the act submitting this amendment, until legislation shall be specially provided therefor."

1. IS THE INITIATIVE AND REFERENDUM CONSONANT WITH A REPUBLICAN FORM OF GOVERNMENT.

In beginning this discussion, it is proper that we should first determine—

What Was Understood by the Word "Republican" at the Time of the Formation of the Constitution.

This question may be answered in several ways. Let us refer to its definition as given in the dictionaries of the times.

Samuel Johnson's dictionary, taking the edition of 1785, contains the following:

> "Republican, adj., placing the government in the people."
> "Republick, commonwealth; state in which the power is lodged in more than one."

Walker's dictionary, as published in 1791, contains the following:

> "Republican, adj., placing the government in the people."
> "Republican, subst., one who thinks a commonwealth without monarchy the best government."
> "Republick, commonwealth; state in which the power is lodged in more than one."

The definitions so furnished by the lexicographers were borne out by the language of the politicians or other writers of the times.

The "Encyclopédie," edited by Diderot in 1779, found a republic to be the form of government in which the people had the supreme power.

> "When in the republic the people, as a whole, have the sovereign power it is a democracy; when the sovereign power lies in the hands of a part of the people it is an aristocracy."

Rousseau, in his "Contrat Social," chapter III, says:

> "The sovereign power can, in the first place, commit the government to the hands of all the people or to the greater part of the people, so that there are more citizen-magistrates than private citizens. One gives to this form of government the name of democracy. Or it may bestow the government upon a small number, so that there are more private citizens than magistrates, and this form has the name of aristocracy; further, it can concentrate all the government in the hands of a single magistrate from whom all

> others receive their power. This third form is the most common, and is called monarchy or royal government."

No one writer, perhaps, exercised greater influence over the minds of the framers of the Constitution than Montesquieu, who in Book II, Chapter I, of The Spirit of Laws said:

> "There are three species of government: the republican, monarchical, and despotic. In order to discover their nature, it is sufficient to recollect the common notion, which supposes three definitions, or rather three facts: 'That a republican government is that in which the body, or only a part of the people, is possessed of the supreme power: A monarchical, that in which a single person governs by fixed and established laws: A despotic government, that in which a single person, without law and without rule, directs everything by his own will and caprice.'
>
> "This is what I call the nature of each government: we must examine now which are those laws that follow this nature directly, and consequently are the first fundamental laws."

Again, in Book II, Chapter II, he said:

> "When the body of the people in a republic are possessed of the supreme power, this is called a democracy. When the supreme power is lodged in the hands of a part of the people, it is then an aristocracy. * * * The people in whom the supreme power resides ought to do of themselves whatever conveniently they can, and what they themselves cannot rightly perform they must do by their ministers."

The understanding of the contemporaries of the framers of the Constitution was not different.

Jefferson, in reply to an address (Ford's edition, V, 262), said:

> "A nation ceases to be republican * * * whenever the will of the majority ceases to be the law."

Again in 1792 (Ford's edition, I, 214), he wrote:

> "The catholic principle of republicanism is that every people may establish what form of government they please, and change it as they please, the will of the nation being the only thing essential."

In writing to Dupont de Nemours (Ford's edition, X, 24), he said:

> "Action by the citizens in person in affairs within their reach and competence, and in all others by representatives chosen immediately, and removable by themselves, constitute the essence of a republic."

In 1816 he wrote (Ford's edition, X, 28):

> "It (Republic) means a government by its citizens in mass acting directly and personally, according to rules established by the majority; and that every other government is more or less republican in proportion as it has in its composition more or less of this ingredient of the direct action of the citizens."

Paine, in his "The Rights of Man," published in 1792, said:

> "What is called a republic is not any form of government; it is wholly characteristical of the purport, matter, or object for which government ought to be instituted and on which it is to be employed—*res publica,* the public affairs or the public good, literally translated the 'public thing.' It is a word of good origin, referring to what ought to be the character and business of government; in this instance it is naturally opposed to the word monarchy, which is a best original signification, it means arbitrary power in an individual person; in the exercise of which himself, and not *res publica*, is the object."

One of the best interpreters of the then accepted meaning of the American Constitution was "The Federalist," and when we turn to its pages we find that the cities of Greece are repeatedly described as republics, although, as we know,

in them nearly all the powers of government were exercised directly by the people themselves. For instance, in Letter XVIII of "The Federalist," written by Hamilton and Madison, it is said:

> "The Achæan League, as it is called, was another society of Grecian *republics* which supplies us with valuable instruction."

Again in the same letter it was said:

> "Among the confederacies of antiquity, the most considerable was that of the Grecian *republics*, associated under the Amphictyonic Council. From the best accounts transmitted of this celebrated institution, it bore a very instructive analogy to the present confederation of the American States."

Again in Letter XXXVIII, written by Madison, the following occurs:

> "What, then, are the distinctive characters of the republican form? Were an answer to this question to be sought, not by recurring to principles, but in the application of the term by political writers, to the constitutions of different States, no satisfactory one would ever be found. Holland, in which no particle of the supreme authority is derived from the people, has passed almost universally under the denomination of a republic. The same title has been bestowed on Venice, where absolute power over the great body of the people is exercised, in the most absolute manner, by a small body of hereditary nobles. Poland, which is a mixture of aristocracy and of monarchy in their worst forms, has been dignified with the same appellation. The government of England, which has one republican branch only, combined with an hereditary aristocracy and monarchy, has, with equal impropriety, been frequently placed on the list of republics. These examples, which are nearly as dissimilar to each other as to a genuine republic, show the extreme inaccuracy with which the term has been used in political disquisitions.

> "If we resort, for a criterion, to the different principles on which different forms of government are established, we may define a republic to be, or *at least may bestow that name on*, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior. It is essential to such a government that it be derived from the great body of the society, not from an inconsiderable proportion or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans and claim for their government the honorable title of 'republic.' It is sufficient for such a government that the persons administering it be appointed, either directly or indirectly, by the people, and that they hold their appointments by either of the tenures just specified; otherwise every government in the United States, as well as every other popular government that has been or can be well organized or well executed, would be degraded from the republican character."

That the term "Republican" was only used in "The Federalist" to distinguish popular from aristocratic or monarchical forms, and not democratic, were clearly shown by Letter XLII, wherein Madison writes:

> "In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations. * * * As long, therefore as the existing republican forms are continued by the States they are guaranteed by the Federal constitution. *Whenever the States may choose to substitute other republican forms, they have a right to do so, and to claim the Federal guaranty for the latter. The only restriction imposed on them is that they shall not exchange republican for antirepublican constitutions; a restriction which, it is presumed, will hardly be considered as a grievance.*" (Italics ours.)

John Adams (Works, vol. VI, page 415), writing in 1790 to Samuel Adams, said:

> "Whenever I use the word republic with approbation, I mean a government in which the people have collectively, or by representation, an essential share in the sovereignty."

In his work "On Government" (Works, vol. V, page 453), writing in 1787, he said:

> "Words cannot more rationally define a republic to signify only a government in which all men, rich and poor, magistrates and subjects, officers and people, masters and servants, the first citizens and the last, are accordingly subject to the laws. This, indeed, would be true and only true definition of republic."

In the same treatise (Works, vol. IV, page 320) he speaks of the Canton of Zug, where the entire population assembled annually to enact laws and choose magistrates, as a "democratical republic."

Writing in 1819 to J. H. Tiffany (Works, vol. X, page 377), he said:

> "The customary meanings of the words republic and commonwealth have been infinite and * * * the strict definition of a republic is that in which the sovereignty resides in more than one man. A democracy, then, is a republic as well as an aristocracy or any mixture of both."
>
> "'The Federalist' is a valuable work, and Mr Madison's part in it as respectable as any other, but his distinction between a republic and a democracy cannot be justified. A democracy is as really a republic as an oak is a tree or a temple a building, and there are in strictness of speech and in the soundest technical language democratical and aristocratical republics as well as an infinite variety of mixtures of both.

Additional data confirming the views already expressed are to be obtained from Elliot's Debates, particularly in so far as members of the constitutional convention took part in the legislatures or conventions ratifying the Constitution. We find that Charles Pinckney, of South Carolina (Elliot's Debates, vol. IV, page 328), in the convention of that State, in a commendatory way referred to the definitions of the various forms of government given by Paley as follows:

> "One of the best political and moral writers (Paley, a deacon of Carlisle, vol. II, 174, 175) I have met with, enumerates three principal forms of government, which, he says, are to be regarded rather as the simple forms, by some combination and intermixture of which all actual governments are composed, than as anywhere existing in a pure and elementary state. These forms are:
>
> "1st. Despotism, or absolute monarchy, where the legislature is a single person.
>
> "2nd. Aristocracy, where the legislature is in a select assembly, the members of which either fill up, by election, the vacancies in their own body, or succeed to it by inheritance, property, tenure of lands, or in respect of some personal right or qualification.
>
> "3rd. Republic, where the people at large, *either collectively or by representation*, form the legislature."

Alexander Hamilton, in the New York convention (Elliot's Debates, vol. II, page 235), pointed out the difference between ancient republics and the one then forming, not denying that the former ones were republics, by the following language:

> "I might go more particularly into the discussion of examples, and show that, wherever this fatal principle has prevailed, even as far back as the Lycian and Achæan Leagues, as well as the Amphictyonic confederacy, it has proven the destruction of the government. But I think observation of this kind might have been spared. Had they not been entered into

by others, I should not have taken up so much of the time of the committee. No inference can be drawn from these examples that republics cannot exist: we only contend that they have hitherto been founded on false principles."

On page 259 of the same volume he shows that he considered that the proposed Constitution was not simply republican, but in addition representative, as follows:

"There have been, undoubtedly, some men who have had speculative doubts on the subject of government; but the principles of republicanism are founded on too firm a basis to be shaken by a few speculative and skeptical reasoners. I trust that the proposed Constitution affords a genuine specimen of *representative and republican* government, and that it will answer, in eminent degree, all the beneficial purposes of society."

In Elliot's Debates, vol. II, page 433, Wilson, appearing in the Pennsylvania Convention, pointed out the distinctions between the different classes of government, and showed that in his opinion, as an advocate and framer of the Constitution, republic and democracy were to be considered as the same thing, and based upon the power of acting either collectively or by representation. He said:

"There are three simple species of government—monarchy, where the supreme power is in a simple person; aristocracy, where the supreme power is in a select assembly, the members of which either fill up, by election, the vacancies in their own body, or succeed to their places in it by inheritance, property, or in respect of some personal right or qualification; a republic or democracy, where the people at large retain the supreme power and act either collectively or by representation."

Again, in Elliot's Debates, vol. V, page 160, Wilson remarked:

"Representation is made necessary only because it is impossible for the people to act collectively."

The same idea was expressed by Luther Martin, a delegate to the Federal Convention from Maryland, who, in his letter to the legislature of Maryland (Elliot's Debates, vol. I, page 344), said:

> "That when individuals enter into government they each have a right to an equal voice in its first formation and afterwards have each a right to an equal vote in every matter which relates to their government; that if it could be done conveniently they have a right to exercise it in person—when it cannot be done in person for convenience representatives are appointed to act for them."

It is also to be noted that John Marshall, as a delegate to the Virginia Convention, III Elliot's Debates, page 222, said:

> "We prefer this system to any monarchy as we are convinced that it has a greater tendency to secure our liberty and promote our happiness; we admire it because we think it a well-regulated democracy."

William Pinkney, of Maryland, who was a member of the Maryland Convention which ratified the Federal Constitution, in a speech in the United States Senate, said (Life of Pinkney, page 603):

> "I have read that Sparta, and Rome, and Athens, and many others of the ancient family, were republics. They were so in form, undoubtedly—the last approaching nearer to a perfect democracy than any other government which has yet been known in the world. Judging of them also by their fruits, they were the highest order of republics." * * * "It was the unconquerable spirit of Liberty, nurtured by republican habits and institutions, that illustrated the pass of Thermopylæ." * * * "What other soil than that which the genial sun of republican freedom illuminated and warmed could have produced such men as Leonidas and Miltiades, Themistocles and Epaminondas?"

That the understanding of the convention was that the word republican should be used by way of contrast to monarchy or aristocracy is also made clear by the statement of Mr. Randolph when the matter was under discussion in the Federal Convention, Elliot's Debates, I, page 406:

> "A republican government must be the basis of our national union, and no State in it ought to have it in their power to change its government into a monarchy."

We can well admit that the framers of the Federal Constitution had in mind to provide for national representative government, but the question before us is not that, although the industry of appellant's attorneys would seem to suggest it. Our sole question is as to what was understood so far as the States were concerned, and it is apparent from the foregoing that the framers of the Constitution used the word republic by way of contrast to the word monarchy or aristocracy, and that in using it it was not their intention to treat government by representatives as more than a means to an end, the end being the rule of the people by the people. In so doing they were availing themselves of what seemed to them the most available means of giving effect nationally to the language of the constitutions of the majority of the States. For instance, the North Carolina Bill of Rights of 1776 declared:

> "That all political power is vested and derived from the people only."

The Virginia Bill of Rights of 1776 declared:

> "That all power is vested in and consequently derived from the people."

The Maryland Bill of Rights of the same year declared:

> "That all government of right originates from the people, is founded in compact only and instituted solely for the good of the whole."

The Pennsylvania Bill of Rights of the same year said:

> "That the people of this State have the sole, exclusive, and inherent right of governing and regulating the internal police of the same.

The New York Bill of Rights of 1777 declared:

> "That no authority shall, on any pretense whatever, be exercised over the people or members of this State, but such as shall be derived from and granted by them."

The Connecticut constitution of 1777 declared:

> "That the ancient form of civil government contained in the charter from Charles II, King of England, and adopted by the people of this State, shall be, and remain, the civil constitution of this State under the sole authority of the people thereof, independent of any king or prince whatever."

The constitution of 1778 of Massachusetts in its Bill of Rights declared:

> "The people of this Commonwealth have the sole and exclusive right of governing themselves as a free, sovereign, and independent State, and do and forever shall exercise and enjoy every power, jurisdiction, and right which is not or may not hereafter be by them expressly delegated to the United States of America in Congress assembled."

The New Hampshire Bill of Rights of 1780 contained the same declaration.

The Georgia constitution of 1777 commenced:

> "We, therefore, the representatives of the people, from whom all power originates and for whose benefit all government is intended by virtue of the power delegated to us, do ordain and declare, and it is hereby ordained and declared, that the following rules and regulations be adopted for the future government of this State."

In none of these constitutions or in any other is there a suggestion of the idea that the representatives of the people had or should possess powers not derived from the people or greater than those which the people inherently possessed, and it was considered that governments so established were republican in form, although all power resided in the people of the several States and might have been exercised by them then and there, without any reservation whatsoever.

It is noteworthy that the constitution of Georgia of 1777 contained the following:

> "ARTICLE LXIII. No alteration shall be made in this constitution without petitions from a majority of the counties and the petitions from each county, to be signed by a majority of voters in each county within this State at which time the assembly shall order a convention to be called for that purpose, specifying the alterations to be made according to the petitions preferred to the assembly by the majority of the counties as aforesaid."

In view of the foregoing, the words of Mr. Justice Wilson, in the case of Chisholm *vs.* Georgia (2 Dallas (U. S.), 419), seem particularly apposite. He said:

> "As a citizen, I know the government of this State (Georgia) to be republican, and my short definition of such a government is one constructed on this principle: That the *supreme* power resides *in the body of the people.*"

From all of the foregoing we believe that certain inferences become irresistible.

1st. That the founders of the Constitution relying upon the common usage of the times regarded the words "democratic" and "republican" as interchangeable.

2d. That they believed that in either a republic or a democracy the people might legislate directly or through their representatives.

3d. That so far as the National Government was concerned, it was the idea and intention of the founders to organize a republic or democracy, whichever it might be termed, in which the national laws should be made by representatives.

4th. That so far as the States were concerned, all that was undertaken to do was to secure for them a guarantee of a republican form of government wherein the laws might be made, except in certain particulars, specified by the Constitution, by the people of the States themselves acting as a whole or by a legislature.

5th. That it was believed that a Congress afforded the most convenient means of enacting laws, but that it never at any time entered into the conception of anybody that the making of laws by the people was or could be unrepublican.

Definitions of the Present Day.

With this foundation, and reserving for the present legal discussions, we need not be surprised to find that the only later lexicographer who treats the word "republican" as signifying "representative" is Webster, and even he gives for the word republic the alternative definition of commonwealth.

Thus we see that the Standard Dictionary says:

> "Republic. A State in which the sovereignty resides in the people and the administration is lodged in officers elected by and representing the people. * * * sometimes military, as in Sparta and the earliest Roman Republic; sometimes a well-nigh pure democracy, as in the first French Republic, or as in Switzerland with its referendum."

We read from the Universal Dictionary, published in 1898, under the word republic, the following:

> "A commonwealth; a form of political constitution in which the supreme power is vested, not in an

hereditary ruler, but in the hands either of certain privileged members of the community or of the whole community. Theoretically, the purest and most perfect form of a republic is a State in which all the members of the community meet in public assembly to enact laws, and transact all other national business. Such a system is, however, practicable only in very small States, and has, therefore, given way in all modern republics to the representative system—that is, one in which the supreme power is vested in rulers chosen periodically by and from the whole body of the people, or by their representatives assembled in a Congress or national assembly, as in the present French republic. The republics of Venice and Genoa were exclusive oligarchies, the supreme power being vested in the nobles or a few privileged persons. Republics of the United States and Switzerland are Federal republics—that is, composed of a number of separate States bound together by treaty, subject to a central government for all national purposes, but having powers of self-government in matters affecting individual States."

The Century Dictionary says:

"Republic. A commonwealth in which the *executive power* is vested in a person or persons chosen directly or indirectly by the body of citizens entitled to vote."

The Encyclopædia Britannica says:

"Latin, Respublica (a commonweal or a commonwealth), a term now universally understood to mean a State or polity in which the head of the government is elective, and in which those things which are the interest of all are decided upon by all. * * * Except as an arbitrary term of art or as a rhetorical expression (republic) has, however, always been understood to mean a State in which the head holds his place by the choice of his subjects. * * * What, however, is emphatically not a 'republic' is a State in which the ruler can truly tell his subjects that the

> sovereignty resides in his royal person and that he is king or czar, 'pure and absolute,' by the grace of God, even though he may hasten to add that 'absolute' is not 'despotic,' which means government without regard to law."

What Legislation is Republican.

Let us briefly discuss at this time the situation from the standpoint of principle.

At the time of the formation of the Constitution it may be presumed, and there is abundant evidence to sustain the presumption, that the framers of the Constitution were familiar with certain historical facts.

They knew that the ancient republics of Greece in general assembly framed their own laws, at least in the largest degree.

They knew that the ancient Teutons assembled together for the same purpose.

They knew that many Swiss cantons, through the institution of the Landsgemeinde, legislated directly.

They knew that in all local affairs, at least, the town meetings of New England controlled.

They knew, further, that under the first charter of Maryland, in existence until after the time of the Declaration of Independence, power to legislate was given to "the free men of same in provinces, or the greater part of them, or of their delegates or deputies whom we will shall be called together for the framing of laws, when and as often as need shall arise."

They knew that a like power existed under the fundamental laws of Connecticut of 1638, and it was not their design to destroy an idea of government so generally accepted, but to facilitate, as they believed, its manner of execution.

It is apparent from the foregoing that the argument of the appellant illustrates a form of mental confusion not uncommon. Because in this country the representative form is used ordinarily to embody the republican principle, the

appellant, it seems, considers that the outer appearance or dress is the thing itself, while the thing itself, as has been shown by numberless citations, is the rule of the people—that is, republicanism—the garb in which it ordinarily appears is representative.

The position may be illustrated in this wise: suppose Newton, considering the falling of an apple from a tree, had said that the principle of gravitation is a falling apple, his logic would have been precisely similar. Finding republicanism—the rule of the people—illustrated by representative institutions, the appellant says that republicanism is representative institutions. Changing the simile, the appellant might say that the steam engine is the expansive power of steam, whereas the steam engine is but one of the ways in which the power is made manifest.

There may be many imaginable forms of republicanism; history teaches us of numbers, some fairly adequate, others entirely inadequate, but with a nearer approach to perfection within the past one hundred and fifty years than ever before, because, perhaps more than ever before, the whole body of the people have had opportunity to develop forms expressive of the ideas fundamentally dear to them. The idea that the people have left in them of their own motion sufficient power to improve and perfect republican rule is one which the appellant is not disposed apparently to accept.

We may now briefly consider what the initiative and referendum really is in its relation to government.

Analysis of the Initiative and Referendum.

The initiative is a proposition made under the forms of law for a change or addition to the law, and is submitted by a given percentage of the people to the entire electorate. If the proposition receives the sanction of the majority of the people it becomes a law.

Analysis will show that this, in its essence, is nothing new or radical. The governments of the United States in their

beginnings have been, except as to royal charters, the result of the action of the people themselves. As a matter of convenience, as a rule, the people have elected delegates to a convention charged with the duty of submitting in turn to the whole mass of people for their approval a constitution which should be the supreme law of the State. If, instead of a convention being called, one man had drafted a constitution and proposed it to his fellow-citizens, and they had adopted such constitution, the constitution so adopted would have had the same force and effect as if it had first been coined by the joint efforts of the members of a constitutional convention. The essential element in either event would have been the legislative act of the people in adopting the constitution. We find, therefore, that in the very beginning of things the people themselves legislated, and we have accepted without question the idea that they had a right so to legislate.

It becomes interesting, then, to discover at what point the people irretrievably lost such right to legislate. Did they lose it by the creation of a legislature charged with the duty of conducting this branch of public business, and, if they did so lose it, what shall we say of the doctrine expressed in so many constitutions, and always tacitly understood when not expressed, that all power proceeds from the people? It is not said that "all power originally proceeded from the people, but that they have lost it by the creation of a constitution;" but practically it is accepted that the powers once conferred by the people may be changed or withdrawn by those who confer them. This is true because, as we find, old constitutions are continually being displaced by newer ones in which the powers and duties of the executive, legislative, and judicial branches of government are enlarged or curtailed. Repeatedly do we find, as we shall have occasion to show, that the power of legislation exercised at one time by the legislature is withdrawn by the people from it and

reserved to the people themselves, who vote directly upon the matter so withdrawn.

And again, if the people have a right to withdraw the power or powers with relation to given subjects in the legislature, why may they not withdraw another, subject only to the requirements of the Federal Constitution as to those things which must be formally acted upon by the legislature. Why may they not withdraw, constitutionally and without conflicting with their own rights, a great mass of powers from the legislature? That they ought not so to do, and will not, we may accept as a matter of course, the legislature being a convenient body to determine nearly every matter of public interest requiring legislative settlement.

Did the people lose this power of government through legislation when the States accepted the Federal Constitution? The answer must be no, because, while the Federal compact presupposes the submission of the States to its provisions, on the other hand the acceptance by the federation into its membership of States in which the rights of government within the State are reserved to the whole people either expressly or by implication amounted to a Federal recognition of the propriety of their constitutions as constitutions expressing the republican idea. If the constitution of the State in its language were opposed to the idea of republican government, as must be contended in effect, as will appear by analysis, by the appellant, the State would not form an integral part of the Union.

The consequences would go much farther. Let us suppose a State to have been admitted to the Union, as in fact one at least was, while still working under a royal charter, and later so changing its constitution as to recognize the people as the source of all authority, and as possessing the right to change its constitution at will, so indicating that the people must have the right to change the constitution through such machinery as they may see fit. Such a new constitution (as well as the old) the appellant would be compelled

to contend was of necessity unrepublican, and its very existence should call into play the strong arm of the Federal Government.

If the people are the source of all power—if they have a right to make and unmake constitutions as they see fit, and as they have done for one hundred and thirty-five years—they must have the right in such constitutions to determine who shall exercise each of the three great branches of government—who shall execute the laws, who shall adjust disputes, and who shall pass the laws. They must have, as we have indicated, the right to limit the powers of their legislatures to the narrowest extent consistent with the duty due by the State to the National Government; they must have the right, not simply to reserve for themselves the power of determining whether particular bond issues shall be made or banks established, but to govern without limitation the whole field of legislation, except as to such powers as the Federal Constitution reposes in legislatures. Either they have this, or they must be bound hand and foot by the legislature which they themselves create. We are not now discussing the policy of a reservation by the people of such joint powers of legislation, as that question is entirely different, but we do venture to affirm that there is no halting point between the two positions—either the people possess the full right of which we speak, so far as legislation is concerned, or in the creation of legislatures they have constructed instruments greater than themselves and over whose action they have no right to exercise legal control.

To go back a step: if the people must create a legislature and have no power of legislation within themselves, not merely any reservation of the right to act on given points reserved by the people to themselves is void, but any limitation which may be placed in the constitution upon the rights of the legislature to act under any given circumstances is likewise void, because when the people in the adoption of the constitution forbid legislation by the legislature upon given

topics, as they so often do, they are themselves legislating—none the less so because the inhibition is contained in the constitution. Thus it will appear, according to the views necessarily held by the appellant, that every single constitution of the States of the Union is unconstitutional, according to the Federal Constitution, because the people have reserved to themselves the right to legislate or because they have declined to create a legislature with the power to act as such with regard to particular subjects, thereby themselves legislating.

The argument of the appellant reduces itself to this: That the people of no State can adopt any constitution which restricts the powers of a legislature or restricts the powers of either courts or governors; for it is impossible that they should do any of these things without affirmative legislation, and such legislation is, the appellant will contend, unrepublican. The only function the appellant will allow to the people in adopting a constitution is that such constitution shall offer a naked framework of a government divided into three parts—legislative, executive, and judicial.

Why the appellant under these circumstances should concede to the people any power, even to adopt a constitution, is not readily answered. Perhaps it will admit that since a Union was formed of States possessing constitutions, such constitutions must originally have been recognized as rightful, but it cannot logically admit the right of the people to change such constitution, even in a minor degree, because the change of the constitution would be an act of legislation by the people of which they are presumed incapable. We are thus brought to a *reductio ad absurdum*.

It will not be lost sight of that the making of a constitution is the highest type of legislation, and the appellant cannot admit that the people should make a constitution designed to govern themselves and their successors during long periods of years, and in the same breath deny the right to pass laws usually ephemeral or of limited application; the

greater assuredly includes the lesser. Nor can it rely upon the distinction between a law or a constitutional amendment proposed to the people by a constitutional convention or legislature, and the same proposed to the people by a considerable number of their body. If the people possess the right to authorize their representatives in a constitutional convention or legislature to submit a proposition to the whole body, they possess an equal right, no greater and no less, to authorize eight per cent of their number to submit the same law. Either way is a matter of detail, the substance being that the people themselves pass upon the proposition and reject it or give it force.

The Initiative and Referendum Offers Merely a Development of an Old Idea.

The initiative and referendum does not fundamentally offer a new idea in American politics, but old ideas and old practices dressed up in a new garb. This may be illustrated by reference to American constitutions.

A number of these constitutions prohibit legislatures from incurring public debts, or certain public debts, except where the proposed action is submitted to the people and ratified by them.

In this respect we may refer to the constitutions of Colorado (Thorpe, 499), Idaho (Thorpe, 935), Illinois (Thorpe, 1020), Iowa (Thorpe, 1148), Kansas (Thorpe, 1255), Kentucky (Thorpe, 1321), Missouri (Thorpe, 2241), Montana (Thorpe, 2327), New Jersey (Thorpe, 2604), New York (Thorpe, 2723), South Carolina (Thorpe, 3336), and Washington (Thorpe, 3999).

It would certainly appear that the creation of a public debt or its enlargement was a legislative matter, and yet the people have declined to allow legislatures to deal with it.

Again, certain States have committed to popular vote by their constitutions the location or the changing of their capi-

tals. Among these states are Alabama (Thorpe, 191) and South Dakota (Thorpe, 3392).

In still other States the creation of local debts is left to the vote of the local citizen. Among such States are Michigan (Thorpe, 1951), South Dakota (Thorpe, 3406), Tennessee (Thorpe, 3457), Texas (Thorpe, 3673), Utah (Thorpe, 3727) and West Virginia (Thorpe, 4057).

In others increase of taxation above the constitutional limit is left to the vote of the local electors or special taxation permitted by them; among these States are Alabama (Thorpe, 220), Florida (Thorpe, 754), and Oklahoma (Thorpe, 4316).

In some States local charters are framed or amended by local residents, as, for instance, California (Thorpe, 457), Minnesota (Thorpe, 2002), Washington (Thorpe, 3994), Oregon (Thorpe, 3020), and Oklahoma (Thorpe, 4279).

In other States local option on the liquor question is constitutionally provided for, as in Delaware (Thorpe, 630).

Again, counties are created or changed only through the sanction of the local vote, as in Maryland (Thorpe, 1821), Ohio (Thorpe, 2919), Wisconsin (Thorpe, 4094), Wyoming (Thorpe, 4142), and Oklahoma (Thorpe, 4324).

In other States by local vote only is the county seat fixed or changed, as in Arkansas (Thorpe, 433), South Dakota (Thorpe, 3377), Texas (Thorpe, 3649), and Oklahoma (Thorpe, 4326).

In certain States banks may not be created save by a vote of the whole people, as in Iowa (Thorpe, 1150).

Again, by the constitution parts of the legislative power to be exercised with reference to railways and other public service corporations are placed in the hands of commissions, as in Virginia (Thorpe, 3938) and Oklahoma (Thorpe, 4304).

The power exercised in many of these cases, and in scores of others which might be enumerated, is, according to the point of view, of the nature of the initiative and of the refer-

endum. The legislature initiates the proposition, formulates it, sanctions it, and submits it to the vote of the people to determine whether or not it shall be the law of the land. In the doing of these acts it in nowise differs from the action of the percentage of the people required in Oregon to submit a measure to the vote of all. In that State a petition signed by 8 per cent initiates, and, the act being complete, it becomes the duty of the State officers to see that the measure so initiated is placed before the whole people on their ballots on election day. While some of the details of the initiative differ, the act which gives vitality to the measure in the two instances is the same—the vote of the people. No distinction in principle can be observed between the initiation of the act by the legislature or by a given percentage of the people. The idea of republican government does not and cannot rest upon the chance question of who formulated the act on which the people voted; the essential thing which gives the completed act its character as a republican or democratic measure is the acceptance by popular voice of the thing proposed. If the scores of measures adopted by the people of the several States, which have been presented to them for consideration by their legislatures, are to receive judicial sanction as having been adopted under a republican form of government, and not as being the acts of a democracy as opposed to that of a republic, if such distinction exists, then the acts which have been adopted by the people of Oregon, Maine, and other States upon the initiative of their fellow-citizens who did not hold office must be accordingly valid.

And if, on the other hand, the acts so adopted by the people of Oregon, Maine, and other States upon the initiative of their fellow-citizens not holding office are invalid as being contrary to republican institutions, then the acts adopted throughout the United States upon legislative initiative must be invalid, although no man has yet been found

who holds that, the constitution giving the right of submission by the legislature of given questions to the people, such action by the people is invalid.

It may not be urged successfully, as we think, that the preparation of a measure for submission to the body authorized to pass upon it is legislation, even though such work be done by a legislature. If a man petitions the legislature that it enact a measure to which his petition is attached, he has taken the first necessary step toward the making of a law—its reduction to paper—and this in an authorized manner, the right of petition being accorded him by all constitutions, but it may not be said that he is a legislator. The function of the legislature or of a percentage of the people on the submission of a law is not materially different. It is equivalent to saying to the people "Here is something which we present to you as, in our judgment, worthy of your best consideration." It is now constitutionally often made requisite that this preliminary step be taken by a legislature, but it is believed that no violence would be done to our system of government were it presented by the governor by way of proclamation to the people asking their attention to the measure and requiring their vote, assuming, of course, that the constitution authorized such a procedure.

See Michigan Central R. R. Co. *vs.* Powers, 201 U. S., 245, cited *infra.*

It is only in the lesser degree that the submission of laws of the character we have spoken of partake of the nature of a referendum. The law is referred by the legislature to the people, or in some cases directly by the constitution to the people to be determined at later elections. A more striking characteristic in our judgment is its parallelism with the initiative.

State Constitutions as Embodying Legislation by the People.

The general idea of a constitution is that it is an instrument which outlines the system of government to prevail in its jurisdiction, but there are, perhaps, no constitutions within the United States which limit themselves in any such manner. A few illustrations may be given from among hundreds.

In Alabama (Thorpe, 217), Arkansas (Thorpe, 353), Georgia (Thorpe, 869), North Carolina (Thorpe, 2839), South Carolina (Thorpe, 3316), Tennessee (Thorpe, 3468), Virginia (Thorpe, 3954) and other States homestead exemptions are explicitly provided for.

In Colorado (Thorpe, 476), Kentucky (Thorpe, 1318) and other States there are provisions against imprisonment for debt.

In Louisiana (Thorpe, 1560), New York (Thorpe, 2734), Pennsylvania (Thorpe, 3147), Washington (Thorpe, 3980) and Oklahoma (Thorpe, 4302) passes are prohibited in certain instances.

In Arkansas (Thorpe, 368) and other States rules of evidence are prescribed.

In Illinois (Thorpe, 1041) and elsewhere extensive provisions covering the law of corporations are inserted.

In the constitutions of many of the States special penalties are placed upon dueling and in Minnesota (Thorpe, 2013) certain wrongful official acts constitute embezzlement.

None of these things has any relation to the structure of government; all of them and of hundreds of other constitutional provisions constitute legislation pure and simple. Although put in constitutional guise, all of these measures have been adopted upon the recommendation of constitutional conventions—bodies not recognized by the Constitution of the United States in the creation of the constitu-

tions of the States, and which were not essential and oftentimes did not exist with relation to the formation of the thirteen original States. The citizens of the State, acting directly or through their representatives, called together constitutional conventions, and these constitutional conventions, in their turn, although they were not essential to a republican form of government according to the theory of any known writers, proposed to their fellow-citizens the particular laws of which we have spoken. Usually they were created by the act of a legislature, but this, as we have seen, was not uniform or necessary so far as the establishment of a republican form of government was concerned; they were simply a set of men delegated, directly or indirectly, with the duty of initiating and presenting constitutions to be voted upon by their fellow-citizens.

It is not obvious why the whole body of the people speaking through a constitution duly adopted by them might not authorize a limited percentage of the whole people to submit laws of whatever character quite as well as they could depute a given number of men in a constitutional convention to do the same work.

We are brought to the same point of discussion as with regard to the submission of all constitutional amendments by the legislatures to the people themselves. The essential thing is not who initiates, or, in other words, who offers to the people the given law, but who formulates and passes upon it ultimately; and we find that it makes no difference whether the law or constitutional amendment originates with the legislature or with a constitutional convention or with a given percentage of the people; in either event its whole validity comes from the action of the people as an entirety, and this in the ultimate analysis gives the republican form of government.

Workings Practically of the Initiative and Referendum.

It has been so often said that the initiative and referendum was desired by but few, and that its workings would mean the rule of the mob and the exposure of the more fortunate to plunder at the hands of those who were less favored, that before leaving the subject we may be pardoned for reviewing the situation so far as developed in those States which have enjoyed the institution.

Arkansas.—The amendment providing for the initiative and referendum was adopted by the electorate of Arkansas as a part of the constitution on Monday, September 12, 1910, by the following vote: For 91,367, against 39,111, affirmative majority 52,256. This amendment is substantially in the form used in the State of Oregon, the initiative being a vote upon the petition of 8 per cent of the legal voters and the referendum upon the petition of 5 per cent. The amendment is self-executing, although legislation may be especially provided therefor.

Colorado.—The constitutional amendment providing for the initiative and referendum was adopted by the vote of the people November 7, 1910, the vote standing: For 89,141, against 28,698, affirmative majority 60,443. The form adopted is substantially identical with that used in Oregon, and is made self-executing under this and other existing laws until special legislation should be enacted with relation thereto.

Maine.—The constitutional amendment providing for the initiative and referendum in this State was adopted in September, 1908, by an affirmative vote of 53,785, negative 24,543, majority 29,242.

In details this amendment differs from that of the State of Oregon, one of these differences being the omission of

constitutional amendment initiative. The Maine amendment provides for a referendum upon the petition of 10,000 voters, while an initiative bill, which must be proposed by not less than 12,000 voters, is submitted to the legislature which may enact it or may prepare a competing bill which will be submitted with the amendment prayed for at a general election.

Under this act the people have voted on three measures which were submitted September 12, 1910, as follows:

The first, dividing the town of York, upon which the affirmative vote was 19,692, and the negative 54,722.

The second, relating to the reconstruction of Portland bridge, the affirmative vote being 21,251, and the negative 29,851.

The third, making uniform the standard relating to the percentage of alcohol in intoxicating liquors, the affirmative vote being 31,093 and the negative 40,475.

In each of these instances the referendum was demanded by the people and the bills which had passed the legislature were rejected, showing that on each of several occasions the legislature had failed to represent the people. In the past September there were submitted to the people two initiative and referendum measures—one with relation to the preservation of the capital at Augusta, which carried, and the second a direct primary act which received a very heavy majority. The legislature, although both the leading parties had promised to pass a direct primary act, failed to do so, and it only became a law on the popular initiative.

Missouri.—At the general election of 1908 the initiative and referendum amendment to the constitution similar to that of Oregon was adopted by an affirmative vote of 177,615; negative, 147,290; majority, 30,325. In the general election of 1910 two constitutional amendments were submitted under the initiative, one relating to the manufacture and sale of intoxicating liquor and another pro-

viding for a three-cent tax on the $100.00 for the support of the University, both of which were lost.

Montana.—The initiative and referendum constitutional amendment of Montana is in form much like that of Oregon, but requires that two-fifths of the whole number of the counties of the State must each furnish as signers to initiative petitions 8 per cent of the legal voters, and on referendum petitions 5 per cent. The amendment does not apply to constitutional propositions, and is self-executing.

Upon the passage of this amendment the affirmative was 36,374, negative 6,616, affirmative majority 29,758.

Oklahoma.—The initiative and referendum was a part of the original constitution of Oklahoma, which was adopted September 7, 1907, by an affirmative vote of 180,333, negative 70,059, majority 107,274.

The form of the amendment is substantially that of Oregon, and is not self-executing. A measure once rejected cannot be again proposed by the initiative within three years thereafter by less than 25 per cent of the legal voters.

Legislative measures are initiated by 8 per cent, but 15 per cent of the legal voters are required to propose amendments to the constitution. An initiative measure must be approved by a majority of all votes cast at an election, but a referendum takes effect when approved by a majority of votes cast thereon.

On November 3, 1908, the people voted upon five propositions submitted by the legislature and which related to the dispensary system, Torrens land system, the location of capital (two related propositions) and the sale of school lands, all of which were voted down or failed to receive the necessary majority.

In 1910 the people voted down an initiative proposition to repeal provisions of the constitution requiring railroads to be domesticated, and a proposition to locate the State capital

at the city of Oklahoma prevailed, but for technical reasons the Supreme Court declared the election void.

On August 2, 1910, an initiative proposition limiting the suffrage was adopted.

At the election held November 8, 1910, five initiative propositions were submitted relating respectively to tax disbursements, railway consolidation, location of capital, woman's suffrage, and local option. All of these failed to carry. On reference by the legislature to the people a general election law failed of adoption.

The secretary of the State election board writes: "I regard the initiative and referendum provision of our laws more as a safeguard against vicious and class legislation by the legislature."

Oregon.—The initiative and referendum amendment to the constitution was adopted in June, 1902, by a vote of 62,024 to 5,668, or an affirmative majority of 56,356. In Oregon, more than elsewhere, has the initiative and referendum idea been developed. The people, so far, have approved twenty-five measures proposed by initiative petition and rejected twenty-three; approved three measures enacted by the legislature against which referendum petitions were filed, and rejected three such measures and approved three measures submitted to the people by the legislature and rejected seven such measures. The measures voted upon and adopted have included laws and constitutional amendments covering the following subjects:

Direct primary law with direct election of United States Senators; local option liquor law; referendum on any act calling constitutional conventions; giving cities sole power to amend their charters; authorizing the legislature to fix the pay of the State printer; applying the initiative and referendum to all local, special, and municipal laws; prohibiting free passes on railroads; taxing gross earnings of sleeping, refrigerating, and oil-car companies, and also ex-

press, telephone and telegraph companies; permitting the location of State institutions at places other than the capital; changing the general election from June to November; fishery bills resulting in the saving of the salmon fisheries; providing for the recall; instructing legislatures to vote for the people's choice of United States senators; corrupt practices act, and others.

South Dakota.—The constitutional amendment providing for the initiative and referendum was first adopted in the United States by a vote of the electors of South Dakota at the November election, 1898, the affirmative vote being 23,816 and the negative 16,483; majority 7,333. At the November election of 1908 four laws were submitted to vote under the iniative and referendum, one affecting the manufacture and sale of intoxicating liquors, one relating to divorce proceedings, one for the preservation of quail, and one relating to the observance of Sunday, all of which received an affirmative vote, and approximately as many votes being cast as were cast for the state offices.

Other States.—In the preparation of this brief we have treated but eight States as having the initiative and referendum. The limitation is so narrow as to call for an explanation. The constitution of the State of Utah since 1900 has provided for it, but the legislature, in successive sessions, has failed to give necessary operative legislation, and thus has nullified the will of the people. While this brief has been in course of preparation the people of California, by a three-fourths vote and 100,000 majority, have by constitutional amendment reserved this power to themselves. The last legislatures of Washington, Wyoming and Nebraska have severally submitted the proposition to their people for the next general election. The legislatures of North Dakota and Wisconsin have passed like amendments to go before the next legislatures, when if then receiving a favorable vote

they will be submitted to the people. Two successive legislatures of Nevada have passed favorably upon the initiative, which at the next election will undoubtedly be accepted by the voters. The state already has the referendum and on one occasion has used it to ratify legislative action.

Rulings of Courts upon State Initiative and Referendum.

Oregon.—The first case in which the State initiative and referendum received the attention of the highest court of this State was that of Kadderly *vs.* Portland, decided in December, 1903, by the Supreme Court of Oregon, 74 Pac., 719. We quote all that was said by the Supreme Court upon this point:

> "Nor do we think the amendment void because in conflict with section 4, article 4, of the Constitution of the United States, guaranteeing to every State a republican form of government. The purpose of this provision of the Constitution is to protect the people of the several States against aristocratic and monarchical invasions, and against insurrections and domestic violations, and to prevent them from abolishing a republican form of government. Cooley Const. Lim. (7th ed.), 45; 2 Story, Const. (65th ed.), section 1815. But it does not forbid them from amending or changing their constitution in any way they may see fit, so long as none of these results is accomplished. No particular style of government is designated in the Constitution as republican, nor is its exact form in any way prescribed. A republican form of government is a government administered by representatives chosen or appointed by the people or by their authority. Mr. Madison says it is 'A government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior.' The Federalist, 302. And in discussing the section of the Constitution of the United States now under consideration, he says: 'but the authority

extends no further than to a guaranty of a republican form of government, which supposes a pre-existing government of the form which is to be guaranteed. As long, therefore, as the existing Republican forms are continued by the States, they are guaranteed by the Federal Constitution. Whenever the States may choose to substitute other republican forms, they have a right to do so, and to claim the restriction imposed on them is that they shall not exchange republican for anti-republican constitutions.' *Id.*, 342. Now, the initiative and referendum amendment does not abolish or destroy the republican form of government, or substitute another in its place. The representative character of the Government still remains. The people have simply reserved to themselves a larger share of legislative power, but they have not overthrown the republican form of the Government, or substituted another in its place. The Government is still divided into the legislative, executive and judicial departments, the duties of which are discharged by representatives selected by the people. Under this amendment, it is true, the people may exercise a legislative power, and may, in effect, veto or defeat bills passed and approved by the legislature and the governor; but the legislative and executive departments are not destroyed, nor are their powers or authority materially curtailed. Laws proposed and enacted by the people under the initiative clause of the amendment are subject to the same constitutional limitations as other statutes, and may be amended or repealed by the legislature at will. The veto power of the governor is not abridged in any way, except as to such laws as the legislature may refer to the people."

The constitutionality of the State initiative was not again challenged in Oregon until the present case arose. 99 Pac. Rep., p. 428, decided in February, 1909. In this case the Supreme Court used the following language:

> "Whether the initiative and referendum amendment to the constitution is invalid, because repugnant to the provisions of the Constitution of the United

> States, was thoroughly argued to and considered by this court in Kadderly *vs.* Portland, and the views of the court as then and now entertained are indicated in the opinion filed in that case, and it is needless to restate them at this time."

The Supreme Court of Oregon in a later case, that of State *vs.* Schluer, decided in May, 1911 (115 Pac., 1061), again recognized its constitutionality; the question then presented to it being merely one as to the rule of interpretation.

In the case of Bradley *vs.* Union Bridge and Construction Company, 185 Fed., 544, the question before the court being merely as to when an initiative law adopted by the people was to take effect, the District Court for Oregon, fully recognizing the validity of the initiative at least by implication, said:

> "The initiative power reserved to the people is a constitutional right vested in them by the fundamental law of the State and to be exercised 'independent of the legislative assembly.' When the people exercise such right and enact a law at the polls, it becomes the expressed will of one branch of the lawmaking power, and it cannot be postponed or delayed by the other."

Oklahoma.—Not long after the admission of Oklahoma to the Union, the Supreme Court of that State had occasion to recognize the constitutionality of the initiative and referendum in the case of *Ex parte* Wagner, 95 Pac., 435. The court used the following language:

> "The question raised in this case is whether or not a petition demanding a referendum vote upon an ordinance duly passed by a city of the first class after the same had taken effect and was in force, such demand having been presented to and filed with the chief executive officer of such city after such ordinance had been published, suspends the force and effect of said ordinance until the next municipal

election. Of course the question necessarily arises as to whether or not the different sections in the Constitution providing for the initiative and referendum are valid, and were in force and effect or self-executing on the 18th day of December, A. D. 1907, the date on which the petition demanding a referendum on said ordinance was filed with the mayor of the city of Kingfisher. The initiative and referendum provisions relating, not only to the affairs of the State, but also to counties and cities, are taken substantially from the constitution of Oregon. The Supreme Court of that State, in the case of Kadderly *vs.* Portland, 44 Or., 119; 74 Pac., 720; 75 Pac., 222, has held that the same are not in conflict with section 4, art. 4, Const. U. S., guaranteeing to every State a republican form of government.

In a number of more recent cases, the Supreme Court of Oklahoma, by acting under the provisions of its constitutional initiative and referendum laws made pursuant thereto, recognized the validity of the provision as to State matters. See for instance, Norris *vs.* Cross, 105 Pac., 1005; *In re* Initiative Petition No. 2. 109 Pac., 823; *In re* Initiative Petition No. 3, 109 Pac., 732; Atwater *vs.* Hassett, 111 Pac., 802; *In re* Initiative State Question No. 10, 110 Pac., 647; Brazell *vs.* Zeigler, 110 Pac., 1052, and Smith *vs.* State, 113 Pac., 932.

Missouri.—The Supreme Court of Missouri, the State possessing an initiative and referendum constitutional provision similar to that of Oregon, has not questioned the validity of the provision, the only case arising under it being that of Halliburton *vs.* Roach (1910), 130 Southwestern, 689, the question before the court being as to whether a proposed initiative amendment properly applied to the Constitution, or was intended to be a law of the State.

Initiative and Referendum in Municipal and Local Applications.

Oregon.—The validity of constitutional provisions vesting initiative and referendum powers in the people of a city with relation to their local affairs was fully recognized in the cases of Farrell *vs.* Portland, 98 Pac., 145; Eugene *vs.* Willamette Valley Co., 97 Pac., 817; Haines *vs.* Forest Grove, 103 Pac., 775; State *ex rel.* Bradford *vs.* Portland Railway, Light and Power Co., 107 Pac., 958; Woodward *vs.* Barbur, 116 Pac., 101, and Kiernan *vs.* Portland, 111 Pac., 379.

Oklahoma.—In the case of Pawhuska *vs.* Pawhuska Oil and Gas Company, 115 Pac., 353, the legality of the initiative and referendum so far as towns were concerned was recognized.

Washington.—Interesting cases with regard to the initiative and referendum have been presented to and decided by the Supreme Court of the State of Washington; the first being that of Cole *vs.* Dorr, 101 Pac., 1016. In this case the court used the following language:

> "The plaintiff's principal contentions were: that the act permitting such cities as by popular vote elect to do so to adopt a form of government differing from that in force in other cities of the same class is void because violative of the several provisions of the State constituton (*a*) vesting the legislative power in the House of Representatives and Senate.
>
> "The claim that in leaving the various cities of first class, free to adopt or reject the provisions of the act of 1907, the legislature attempted to delegate its powers to the people of those municipalities requires little discussion. Even in jurisdictions where it is held that the taking effect of statute cannot be made to depend upon the result of popular vote the prin-

> ciple is recognized that 'if an act in question is complete in itself, and requires nothing further to give it validity as a legislative act, it is not vulnerable to attack on constitutional grounds simply because the limits of its operation are made to depend upon a vote of the people.' Eckerson *vs.* City of Des Moines, 137 Iowa, 452, 478; 115 N. W., 177, 187."

In the case of Hartig *vs.* Seattle, 102 Pac., 409, the Supreme Court of Washington discussing somewhat as to whether the granting of the initiative and referendum power to the citizens of the cities was antagonistic to a republican form of government, used the following language:

> "Under the power of the Constitution subject to the limitation above mentioned, there can be no question of the right of the city to adopt and carry into effect the initiative and referendum plan of government; for it can scarcely be contended that this plan is inconsistent with a republican form of government, the central idea of which is a government by the people. Whether the expression of the will of the people be made directly by their own acts or through representatives chosen by them is not material. The important consideration is a full expression. Does, then, the amendment under consideration in any way conflict with section 740, the pertinent part of which is as follows: 'The legislative powers of any city, organized under the provisions of this act, shall be vested in a mayor and a city council, to consist of such number of members, and to have such powers as may be provided for in its charter,' etc. The first thought that occurs to one in reading this section is that, while the powers are vested in the mayor and council, they are only such powers as are provided for in the charter. So that, after all, the powers spring from the people and are not over and above the control of the people. And this was the view taken by this court in Hindman *vs.* Boyd, 42 Wash., 17; 84 Pac., 609."

In the later case (1911) of Walker *vs.* Spokane, 113 Pac., 778, the Supreme Court of Washington again and at length

reviewed the subject, much of the language being so apropos that we do not hesitate to quote it extensively:

> "Something has been said to the effect that this charter cannot be sustained under the republican form of government guaranteed to the States by the Federal Constitution. Section 4, art. 4 of that document provides: 'The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion.' * * * In addition to the fact that this guaranty applies only to a State government, it means only such a government as is under the control of the people; or in other words, a representative government. At the time of that enactment, there was *no thought of an encroachment on the part of the people, and consequently no attempt to guard against it.* The apprehension was exactly the reverse. It was an enroachment upon the rights of the people which the fathers sought to prevent; and it would be impossible to violate *the spirit of that provision by enlarging the representative powers of the people.* The distinction between a democratic form of government and a republican form of government, in the sense in which the term is used in the Federal Constitution, is more theoretical than real, for the vital idea in both is the government *by the people;* and whether the will of the people be expressed through a *representative or through a personal announcement, it is but a difference in form of expression.* The action of the representative must proceed upon the theory that he is expressing the will of the constituency; otherwise the theory of a republican form of government is a delusion.
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> "Sustaining the view which we have expressed with relation to the object of the constitutional guaranty, it is said by Mr. Cooley, in his work on Constitutional Limitations, page 42: 'The last provisions that we shall here notice are that the United States shall guarantee to every State a republican form of government, and that no State shall grant any title of nobility. The purpose of these is to protect a

> Union founded on republican principles, and composed entirely of republican members, against aristocratic and monarchical innovations.'"

California.—The question as to the constitutionality of the initiative and referendum in local affairs received its fullest discussion in the case *In re* Pfahler, 88 Pac., 270, 11 L. R. A. (N. S.) 1092, 150 Cal., 71, decided in 1906, and we quote from the opinion as having persuasive authority on the question now before the court. The California Supreme Court says:

> "These two amendments, the initiative and the referendum, have the same effect in this respect. In each it is the vote of the electors at the ballot box that finally determines whether or not a proposed measure shall be a law at all, and it can make no difference, in principle, whether the proposition originates with electors or with the council. In each the electors by their vote at the ballot-box directly exercise legislative power. By these amendments the electors are, except in certain specified cases, given an effectual veto power as to all ordinances approved by the council, and are clothed with authority, paramount to that of the council, to directly enact such local legislation as they may deem expedient, where the council declines to enact the same. The charter provision relative to the initiative, which is substantially similar to recently enacted provisions in the charters of other municipalities of the State, is vigorously attacked by counsel for petitioner and other attorneys appearing as *amici curiæ*, who claim to see in this curbing of the power of the ordinary legislative body of the city, this vesting in the electors of a municipality the power to enact measures which the legislative body refuses to approve, a violation of our own constitution, and a forbidden departure from the republican form of government guaranteed by the Constitution of the United States.
>
> "The latter objection may appropriately be first considered. Its sole foundation is section 4 of article 4 of the Constitution of the United States, which is as

follows: 'The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.' The contention here is, necessarily, that any attempt by a State to provide for a direct exercise of legislative power by the people, instead of by representatives of the people elected or appointed for that purpose, is, even in purely local affairs, inconsistent with the republican form of government guaranteed by this provision, and ineffectual for any purpose; the theory being that such provision requires a purely representative form of government, not only in the State itself, but also in all its subdivisions, leaving no vestige of power of direct legislation in the people themselves. If we assume that this claim presents a judicial question, rather than a political one, to be determined by the Congress of the United States (see, however, Luther *vs.* Borden, 7 How., 1, 12 L. Ed., 581; Taylor *vs.* Beckham, 178 U. S., 548, 20 Supreme Court, 1009, 44 L. Ed., 1187), we are brought to a consideration of the question as to what was meant by this guaranty of a republican form of government. For all the purposes of this proceeding it is sufficient to hold, as we do, that it does not prohibit the direct exercise of legislative power by the people of a subdivision of a state in strictly local affairs. In saying this, we do not wish to be understood as intimating that the people of a State may not reserve the supervisory control as to general State legislation afforded by the initiative and referendum, without violating this provision of the Federal Constitution. That they may do so has been decided by the Supreme Court of Oregon in the case of Kadderly *vs.* Portland, 44 Or., 118, 74 Pac., 710, 75 Pac., 222, which appears to be the only case in which that question has been directly presented. See, also, Hopkins *vs.* City of Duluth, 81 Minn., 189, 83 N. W., 536. However this may be, it is clear that the direct participation of the electors of subdivisions of a State in legislation as to local affairs was never

intended to be prohibited by the framers of the Federal Constitution, or the States adopting the same, and that such power has been exercised by them, where not inconsistent with provisions of their State constitution, in innumerable instances, from the institution of our government to the present day, without interference of any kind on the part of the Federal Government.

"As is universally recognized by courts and writers on constitutional law, it must be assumed that there was nothing in any of the forms of government prevailing in the various States at the time of the adoption of the constitution that was violative of the provisions under discussion. Discussing this question, and speaking of the forms of government then existing in the various States, the Supreme Court of the United States said, in Minor *vs.* Happersett, 21 Wall. (U. S.), 162, 175, 176, 22 L. Ed., 627: 'These governments the constitution did not change. They were accepted precisely as they were, and it is therefore to be presumed that they were such as it was the duty of the States to provide. Thus we have unmistakable evidence of what was republican in form within the meaning of that term as employed in the constitution.' It is unnecessary to here do more than to refer to the widely-known and well-recognized form of local government that prevailed in several of the States at the time of the adoption of the constitution known as the 'New England town government,' under which all the inhabitants in town meeting directly exercise such legislative power as was essential to the conduct of local affairs. No difference material to the objection under discussion is to be found in the fact that they did this in public meeting, rather than by secret ballot at the polls, as under the provision before us. The objection here made is that, under the republican form of government guaranteed by the Federal Constitution, such power cannot be directly exercised by the people, and, so far as that objection is concerned, if the people may legislate directly in town meeting, they may do so by their votes at the polls. The constitutional provision

> was framed and adopted with full knowledge of this system of local government that then obtained in four of the States, and that system was continued under the constitution, without any question as to its validity. It is still to be found not only in several of the New England States, but also in other States (see 1 Bryce, Am. Com., pp. 594, 601, 605; I Dillon, Mun. Corp., § 258), and we are not aware that any suggestion has ever been made that this form of local government is prohibited by the Federal Constitution."

A similar ruling was made in the cases of Rushton *vs.* Handley, 115 Pac., 56, and Migliavacca *vs.* Napa, 10 Cal. App., 383.

In the case of Home Telephone and Telegraph Company *vs.* City of Los Angeles, 211 U. S., 183, 53 Lawyers' Ed., p. 176, there was before this court a charter containing a provision that upon petition of fifteen per cent of the voters of the State, an ordinance proposed should be submitted to the people and might be adopted by them. The constitutional question was not discussed, but passed *sub silentio.*

Other States.—The power of local control has been recognized by the Supreme Court of a number of other States, as, for instance, in Missouri, in the cases of O'Brien, 29 Mo., 530, with reference to a local option law; Naggard *vs.* Pond, 93 Missouri, 606, another law of the same character, providing for the establishment of a municipal court.

In Massachusetts, in the case of Stone *vs.* Charlestown, 114 Mass., 214, where a statute uniting two municipalities was not to go into effect unless supported by the voters of both. In Graham *vs.* Roberts, 85 N. W., 1008, permitting a local act to take effect upon the vote of the people.

In Texas, in the case of S. W. Telephone and Telegraph Company *vs.* Dallas, 134 S. W., 321, which found nothing in the constitution of Texas prohibiting the legislature from submitting subjects to the voters of a city on the initiative.

In Pennsylvania, in the case, *In re* McGonnell's license, 58 Atlantic, 615, wherein a local option law to take effect upon the approval of the people was sustained.

In South Dakota, in State *vs.* Barber, 101 N. W., 1078, wherein a like law was sustained.

In Michigan, in the case of Jackson *vs.* Harrington, 125 N. W., 382, recognizing the right of the initiative and referendum in towns.

The brief of the Honorable Attorney General cites additional valuable cases from Colorado and elsewhere.

The cases we have cited from the various States are among the most recent ones, and might be added to indefinitely were it worth while to seek earlier authorities.

2. IS THE INITIATIVE AND REFERENDUM UNCONSTITUTIONAL AS BEING DEROGATORY TO THE RIGHTS OF THE LEGISLATURE AS RECOGNIZED BY THE FEDERAL CONSTITUTION?

Several paragraphs of the Constitution said to have been violated by the State of Oregon, and other than article 4, section 4, are paragraphs relating to the operations of the Government of the United States, and if the State violated them, and we deny such violation, the only aggrieved party is the Federal Government and not the appellant, such provisions having no relation to the appellant.

It is argued that because it is impossible that the people as a whole should exercise the powers conferred by the Constitution of the United States upon a legislature, therefore, the whole constitutional provision, providing for the initiative and referendum, is void. Our reply in brief would be that it does not lie within the power of the appellant to raise any question at all as to the powers affecting the National Government, which it is said the people as a legis-

lature cannot exercise. That so far as it is concerned the only power reserved by the people is a power to determine the subjects and the rate of taxation. That unless it can show that it is impossible for the people of the State to assume to themselves this power, their objection must absolutely fail. The power assumed by the people in the taxation act is, as we contend, absolutely severable, therefore, from the powers which the appellant says the people may not exercise.

The general question, as to whether an act is to be declared void because couched in broad and general terms, whereas certain exceptions are constitutionally made, to which the act may not apply, has been passed upon repeatedly by this court. One of the latest cases touching the subject is that of McCullough *vs.* Commonwealth of Virginia, 172 U. S., 102, wherein, on page 112, speaking by Mr. Justice Brewer, it was said:

> "It is elementary law that every statute is to be read in the light of the Constitution. However broad and general its language it cannot be interpreted as extending beyond those matters which it was within the constitutional power of the legislature to reach. It is the same rule which obtains in the interpretation of any private contract between individuals. That, whatever may be its words, is always to be construed in the light of the statute; of the law then in force; of the circumstances and conditions of the parties. So, although general language was introduced into the Statute of 1871, it is not to be read as reaching to matters in respect to which the legislature had no constitutional power, but only as to those matters within its control, and if there were, as it seems there were, certain special taxes and dues which under the existing provisions of the State constitution could not be affected by legislative action, the statute is to be read as though it in terms excluded them from its operation."

Thus, in the case of the Philadelphia and Reading Railroad Company *vs.* Pennsylvania, 15 Wallace, 232, where a

tax was levied upon all the business in a State, this court limited its decision as to the constitutionality of the act to the tax as applied to interstate commerce, saying:

> "We recognize fully the power of each State to tax at its discretion its own internal commerce and the franchises, property or business of its own corporations, so that interstate intercourse, trade or commerce be not embarrassed or restricted; that must remain free.
>
> "The conclusion of the whole is that in our opinion the act of the legislature in Pennsylvania of August 7th, 1861, so far as it applies to articles carried through the State, or articles taken up in the State, and carried out of it, or articles taken up without the State and brought into it, is unconstitutional and void."

Likewise in the case of Ratterman *vs.* Western Union Telegraph Company, 127 U. S., 411, the court said:

> "Under these views, we answer the question in regard to which the judge of the circuit court divided in opinion by saying that a single tax, assessed under the revised statute of Ohio upon the receipts of a telegraph company, which were derived partly from interstate commerce, and partly from commerce within the State, but which were returned and assessed in gross, and without separation or apportionment, is not wholly invalid, but is invalid only in proportion to the extent that such receipts were derived from interstate commerce, concurring therein with the circuit judge in his action enjoining the collection of the taxes on that portion of the receipts derived from interstate commerce, and permitting the Treasurer to collect the other tax upon property of the company and upon receipts derived from commerce entirely within the limits of the State, this decree is affirmed."

It has thus been shown that the rights of the United States are entirely severable from the rights of the individual, and

it must be that even if the United States had a right of complaint, it would not follow that the telephone company possessed a power to rely upon the infringement of the rights of the United States to excuse him from complying with such a law as the people themselves might have particularly inserted in their constitution as one properly to be passed by them. The doing of a wrong, had one been done, would not give a right of action to a person not affected thereby. In bearing upon this proposition we refer to the case of Threadgill *vs.* Cross, 26 Okla., 802; 109 Pac., 558; 138 Am. St. Repr., 964, wherein application was made for a writ of mandamus to the Secretary of State, compelling him to file certain initiative petitions. This he was unwilling to do, claiming that the proposed law would be unconstitutional. In the course of their discussion the court said:

> "In the legislative department of the Government is vested the power of enacting all laws. To that department is intrusted the determination of what laws shall be enacted, and what laws shall not be enacted. It must, in the first instance, determine whether a proposed measure is valid or invalid, and in doing so it will not be presumed that the members of that department, whether they be the electors at the polls, or the members of the legislature, will enact or attempt to enact legislative measures that they know are violative of the State constitution or of the Federal Constitution, but that they will act from patriotic motives and endeavor to adopt such laws only as will best serve the public good, keeping in mind the limitations upon their powers fixed by the constitutions of the State and the Federal Constitution as the supreme law of the land."

* * * * * * *

> "When the people of a State are engaged in proposing and adopting a constitution or amendments thereto, they are exercising a legislative power and function of the highest order, and while so engaged they constitute part of the legislative department of the State. Evans *vs.* Jones, 29 Okla., 503; 91 Pac.,

193; *State ex rel.* Cranmer *vs.* Thorson, 9 S. D., 149; 68 N. W., 292; 33 L. R. A., 582."

The court cites many authorities tending to show that the interest of the Secretary of State was not such as justified him in raising any objection to the constitutionality of the law, and plainly recognized the right to the people directly to legislate.

In the case of Lampasas *vs.* Bell, 180 U. S., 276, relying in part on W. U. Tel. Co. *vs.* A. A. R. Co., 178 U. S., 239, it was held that where the suit did not really involve the construction of the Constitution it could not be said to arise under it. This is such as case as to the sections under consideration, with which the appellant is not concerned.

THE APPEAL IN THIS CASE SHOULD BE DISMISSED FOR WANT OF JURISDICTION.

In making this suggestion and motion, for we now move that the case be so dismissed, we rely upon the argument so far made, and particularly desire to discuss in addition thereto, although involved in what has preceded, the following points:

1. There is no party before the court in position to raise any constitutional question based upon article 4, section 4, of the Constitution.

2. A State may apportion its legislative power in such manner as it see fit, and the method of such apportionment raises no Federal question.

3. The only branch of the Government competent to decide as to whether there exist in a State a republican form of government is the political and not the judicial branch.

1. *There is no party before the court in position to raise any constitutional question based upon article 4, section 4, of the Constitution.*

Article 4, section 4, of the Constitution reads as follows:

> "The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion, and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence."

Under this section the United States is the party guarantor, and each State in the Union is the party guaranteed. If this section be violated, the State or its people in their collective capacity have a right to contend that as to them the Constitution has been broken and that they are entitled to redress. The clause in no sense is a guarantee of individual rights, but of a political condition. No one man can say that his personal rights have been interfered with under the Constitution by the institution even of a monarchical government. For a private individual to say that he will not pay his dues to the State because the Government is monarchical might be praiseworthy, but would not present a Federal question, because the Federal Government is under no obligation to him to preserve him against a monarchy, or even against an aristocracy, save as he may be a member of the community. It is his duty "to render unto Cæsar the things that are Cæsar's."

Let us suppose that after application of the legislature the United States had failed to protect the citizens against domestic violence. Will it be contended that for such failure there could exist either moral or legal obligation on the part of the United States to make the citizen whole in his losses? If this may not be contended, then it may not be argued that the United States is under any obli-

gation whatsoever to insure to the individual citizen a republican form of government.

The whole paragraph is to be read together. *The United States guarantees to every State* a republican form of government. The United States "shall protect each of them against invasion." *The United States on the application of the legislature*, meaning the application of the legislature of every State, must protect them against domestic violence. Only the States, therefore, and not the citizens, are in the slightest degree concerned in the application of any part of this provision. The States are guaranteed by the United States a republican form of government. The United States protects each of them against invasion, and the United States, on application of the legislature, protects each of them against domestic violence. In no single instance is anything whatsoever secured to the individual citizen.

2. *A State may apportion its legislative power in such manner as it sees fit, and the method of such apportionment raises no Federal question.*

We have in essence argued this question heretofore at length. We have pointed out that legislation pure and simple may be passed by the whole body of the people, or that it may be the action of the legislature. We have pointed out that this legislation may be initiated by a legislature, either acting for itself completely or submitting its proposition to the vote of the whole people; by a constitutional convention initiating ordinary legislation, as well as a Constitution, and submitting its labors to be voted on by the whole people; and by the initiative of a given per cent of the people submitted to the whole mass for their judgment. The manner in which legislation may be divided offers no Federal question. The propositions we are now enumerating have in our judgment been directly passed upon by this court. We refer particularly to the case of

Michigan Central Railroad Company *vs.* Powers, 201 U. S., 245, wherein it is clearly indicated that even though legislative functions be delegated to officers other than the legislature, a Federal question would not be raised. The court, on page 294, said:

> "There might be a question whether, even if there were a clear delegation of legislative functions to other departments of the State Government, it would be void under the Federal Constitution. Whatever, in view of the distinct grant in the Federal Constitution to the President, Congress, and the Judiciary of separately the executive, legislative, and judicial powers of the nation, may be the power of Congress in the delegation of legislative functions, a very different question is presented when the restrictions of the Federal Constitution are invoked to restrain like action in a State. Crimes against the nation must be prosecuted by indictment, yet a State may proceed by information. Suppose a State, by its constitution, grants legislative functions to the executive, or to the judiciary, what provision of the Federal Constitution will nullify the action? Will the grant work an abandonment of a republican form of government, or be a denial of due process, or equal protection?"

In the later case of Prentis *et al. vs.* Atlantic Coast Line Company, 211 U. S., p. 210, the court, on pages 224 to 226, expressed the following views with reference to the powers and characteristics of the State Corporation Commission of Virginia:

> "The State Corporation Commission is established and its powers are defined at length by the constitution of the State. * * * Among its duties it exercises the authority of the State to supervise, regulate, and control public service corporations, and to that end, as is said by the Supreme Court of Virginia and repeated by counsel at the bar, it has been clothed with legislative, judicial, and executive powers. Sup-

folk & P. Belt Line R. Co. *vs.* Com., 103 Va., 289, 294; 19 S. E., 39.

* * * * * * * *

"In order to decide the cases it is not necessary to discuss all the questions that were raised or touched upon in argument, and some we shall lay on one side. We shall assume that when, as here, a State constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder, so far as the Constitution of the United States is concerned. Dreyer *vs.* Illinois, 187 U. S., 71, 83, 84; 47 L. Ed., 79, 85; 23 Sup. Ct. Rep., 28; Winchester and S. R. Co. *vs.* Com., 106 Va., 264, 268; 55 S. E., 692. We shall assume, as we have said, that some of the powers of the commission are judicial, and we shall assume, without deciding, that, if it was proceeding against the appellees to enforce this order, and to punish them for a breach, it then would be sitting as a court and would be protected from interference on the part of courts of the United States.

"But we think it equally plain that the proceedings drawn in question here are legislative in their nature, and none the less so that they have taken place with a body, which, at another moment, or in its principal or dominant aspect, is a court such as is meant by § 720."

That legislative powers may be taken away from the legislature and placed elsewhere is again shown in the decision of the Supreme Court in Forsyth *vs.* Hammond, 166 U. S., 506, wherein the court says (p. 519):

"It may be true that the general rule is that the determination of the territorial boundaries of a municipal corporation is purely a legislative function, but there is nothing in the Federal Constitution to prevent the people of a State from giving, if they see fit, full jurisdiction over such matters to the courts, and taking it entirely away from the legislature. The preservation of legislative control in such matters is not one of the essential elements of a republican form of government which under Sec. 4 of Art. 4 of the

> Constitution, the United States are bound to guarantee to every State in this Union, and whenever the Supreme Court of a State holds that under the true construction of its Constitution and statutes, the courts of that State have jurisdiction over such matters, the Federal courts can neither deny the correctness of this construction, nor repudiate its binding force as presenting anything in conflict with the Federal Constitution."

If, therefore, the State by its constitution seeks to place a part of its legislative powers, as in this case, in the people as well as in the legislature, it is but fixing the manner of their exercise as the Supreme Court says it may, and no Federal question whatsoever has been or can be raised. It would certainly be the height of absurdity, in view of the expression of this court to the effect that legislative powers may be given to a single individual,—the executive—to say that legislative powers may not be initiated by eight per cent of the whole people, whose interest in the welfare of all can scarcely be inferior to that of a single man.

3. The only branch of the Government competent to decide as to whether there exist in a State a Republican form of Government is the political and not the judicial branch.

This proposition is involved in the first of the three propositions we are now advancing. As therein contended, no private individual is in a position to raise a question relating to the general political operations of the government of a State. We have now to submit that the judicial branch has no right or power to pass upon a question so political as that raised by the appellant in this case, even though the appellant's personal fortunes were directly affected by the conclusion to be reached. This court has said in express terms that the determination of political questions, and determination in fact of the very existence of a republican form of government, rests with in Congress and with the Executive, and in

so doing, in our judgment, the very question designed to be raised by the appellant has been finally and absolutely determined so far as the judiciary is concerned. If he has any right to believe himself aggrieved by the existence of a government which is too republican or too democratic to meet his ideas of what a government should be, his appeal lies to Congress or to the Executive. We shall enumerate the cases before this court in which to a greater or less degree the view upon which we insist has been elaborated.

Perhaps the earliest case coming before this court calling for a declaration of principle in this regard is that of the Cherokee Nation *vs.* The State of Georgia, 5 Peters, 1. In this case the Cherokee Nation sought to enjoin the execution of certain acts of the legislature of the State of Georgia, and this court said:

> "What these people may have a right to claim of the executive power is one thing; whether we are to be the instruments to compel another branch of the government to make good the stipulations of treaties is a very different question. Courts of justice are properly excluded from all considerations of policy, and therefore are very unfit instruments to control the action of that branch of government which may often be compelled by the highest considerations of public policy to withhold even the exercise of a positive duty."

This language followed the declaration by the court to this effect:

> "I cannot entertain a doubt that it (the question before the court) is one of a political character altogether, and wholly unfit for the cognizance of a judicial tribunal."

The next case, and one of the utmost importance in this connection, is that of Luther *vs.* Borden, 7 How., 1. In this case the question was raised as to the rightfulness of what was called the "charter" government of the State of Rhode

Island, it being contended that there did not exist in Rhode Island a republican form of government. The question was raised by a private individual under arrest pursuant to the directions of the government which had been recognized as proper by the executive authorities of the United States. The court, referring to one of the points insisted upon, said:

> "The question relates altogether to the constitution and laws of that State; and the well settled rule in this court is that the courts of the United States adopt and follow the decisions of the State courts in questions which concern merely the constitution and laws of the State."

(This relates, of course, to one of the questions we have already discussed.)

Continuing further, the court says:

> "The fourth section of the fourth article of the Constitution of the United States provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion; and on the application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence.
>
> "Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the council of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no senators or repre-

> sentatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts."

It will not be overlooked by the court that at no time since the adoption of the initiative and referendum amendment to the Oregon constitution has the executive failed to recognize Oregon as possessed of a republican form of government; and, further, that during the past nine years there have been repeated elections of senators and members of the House of Representatives who have been received by the Congress of the United States as representing in its body the people of Oregon, something which could not have taken place under the language just quoted if Congress had failed to recognize the republican character of the constitution of the State.

Neither will the court overlook the fact that during many of these years, and as to South Dakota for a longer period, Congress has similarly received, as entitled to be received, Senators and Representatives from South Dakota, Montana, Oklahoma, Arkansas, Missouri, and Maine, all of whom have for longer or shorter periods enjoyed direct legislation, while the Congress just adjourned, with the approval of the President, has provided for the admission of Arizona, with a working constitution almost a literal transcript upon this point of that of Oregon. At no time has the Executive of the United States failed to recognize the officers of these States as entitled in their respective capacities to speak for them, while time without number the Secretary of State of the United States, acting for the President, has certified to their official capacities. This court is now asked virtually to declare that, although the Executive and Congress, acting within the lines of their duty, have time and again declared Oregon and the other States enumerated to be possessed of a republican form of government it now falls to the judiciary to say that nev-

ertheless they were in error, and that Oregon, at least, is being governed today in a way outside of and antagonistic to the Constitution of the United States. We cannot believe that the courts of this country in such manner will overrule the action of the political branches of the government in matters particularly confided to their care.

We quote once more from the case of Luther *vs.* Borden. In the conclusion of the opinion the court said:

> "No one, we believe, has ever doubted the proposition that according to the institutions of this country the sovereignty in every State resides in the people of the State, and that they may alter and change their form of government at their own pleasure, but whether they have changed it or not by abolishing an old government and establishing a new one in its place is a question to be settled by the political power, and when that power has decided, the courts are bound to take notice of its decision and to follow it."

We quote now from the case of Duncan *vs.* McCall, 139 U. S., 449:

> "By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but while the people are thus the source of political power, their governments, National and State, have been limited by written constitutions, and they have themselves thereby set bounds to their own power as against the sudden impulses of mere majorities."

After reviewing the case of Luther *vs.* Borden, the court continues:

> "The State of Texas is in full possession of its faculties as a member of the Union, and its legislative,

executive, and judicial departments are peacefully operating by the orderly and settled methods prescribed by its fundamental law. Whether certain statutes have or have not binding force, it is for the State to determine, and that determination in itself involves no infraction of the Constitution of the United States, and raises no Federal question giving the courts of the United States jurisdiction."

We quote this as particularly pointing out that no Federal question whatsoever is presented to this court by the appellant, a contention we have discussed under other headings.

The last two cases were referred to in the case of Taylor *vs.* Beckham, 178 U. S., 548, and where again this court refused to accept jurisdiction when the existence of a republican form of government was challenged. The court said:

"But it is said that the 14th Amendment must be read with section 4 of article 4 of the Constitution, providing that 'The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion, and, on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.' It is argued that when the State of Kentucky entered the Union, the people 'surrendered their right of forcible revolution in State affairs,' and received in lieu thereof a distinct pledge to the people of the State of the guaranty of a republican form of government, and of protection against invasion and against domestic violence; that the distinguishing feature of that form of government is the right of the people to choose their own officers for governmental administration; that this was denied by the action of the general assembly in this instance; and, in effect, that this court has jurisdiction to enforce that guaranty, albeit the judiciary of Kentucky was unable to do so because of the division of the powers of government."

* * *

"It was long ago settled that the enforcement of this guaranty belonged to the political department. Luther *vs.* Borden, 7 How., 1; 12 L. Ed., 581."

* * *

> "These observations are applicable here. The Commonwealth of Kentucky is in full possession of its faculties as a member of the Union, and no exigency has arisen requiring the interference of the General Government to enforce the guaranties of the Constitution, or to repel invasion, or to put down domestic violence. In the eye of the Constitution, the legislative, executive, and judicial departments of the State are peacefully operating by the orderly and settled methods prescribed by its fundamental law, notwithstanding there may be difficulties and disturbances arising from the pendency and determination of these contests."

Having thus time and again decided that an objection to the form of government as being unrepublican may not be raised before this court, but is a matter for other branches of the Government to consider, we submit that this case must be dismissed for want of jurisdiction of the court.

NECESSITY AND PROBABLE FUTURE OF THE INITIATIVE AND REFERENDUM.

We shall not undertake to discuss at any length the necessity and probable future of the initiative and referendum left to their free development, but that these instruments of democratic republicanism are essential and demanded by growing public sentiment is manifest from the opinions expressed by two of the most brilliant of recent English writers.

We shall refer first to the work "Democracy and Liberty" of Professor W. E. H. Lecky, who will not be suspected of any undue partiality toward republican forms of government. We extract from the work in question (volume I):

> Page 277: "One great possible constitutional change, very new to English public opinion, has risen with remarkable rapidity into prominence in the last few years, and is perhaps destined hereafter to have

an extensive influence. I mean the Swiss referendum."

* * *

"The French Convention, in 1793, attempted to carry out the doctrine of Rousseau by introducing into its Constitution a provision that, in case a certain proportion of the electors desired it, there should be a popular vote upon every law; and although this Constitution was never put into force, the same doctrine was, as we have seen, in some degree carried out in the shape of plebiscites directly sanctioning several changes of government."

Page 279: "Laveleye has collected an interesting series of examples of the manner in which this power has been used. On the whole the popular vote, when it extends over the entire confederation, more frequently negatives than ratifies the measures submitted to it. The tendencies which it most strongly shows are a dislike to large expenditures, a dislike to centralization, a dislike to violent innovation."

Page 282: "In America, no fact is more clearly established than that such legislatures almost invariably fall into the hands of caucuses, wirepullers, and professional politicians, and become centers of jobbing and corruption. One of the main tasks of the best American politicians has, of late years, been to withdraw gradually the greater part of legislation from the influence of these bodies, and to entrust it to conventions specially elected for a special purpose, and empowered to pass particular laws, subject to direct ratification by a popular vote."

Page 286: "If such a system could be made to work, it would almost certainly do something to correct, by an eminently democratic method, democratic evils that are threatening grave calamities to the Empire."

Page 287: "In the conditions of the present day, no serious thinker can fail to perceive the enormous danger of placing the essential elements of the Constitution at the mercy of a simple majority of a single Parliament, a majority, perhaps, composed of heterogeneous and discordant factions, combined for a party purpose, and not larger than is required to pass

a bill for regulating music halls or protecting sea birds' eggs."

"The referendum, in its first and most universal application, is intended to prevent this evil by making it impossible to carry constitutional changes without the direct and deliberate assent of the people. It would also have the immense advantage of disentangling issues, separating one great question from the many minor questions with which it may be mixed. Confused or blended issues are among the gravest political dangers of our time. Revolutionary and predatory measures are much less likely to be carried on their merits than because their proposers have obtained a majority by joining with them a sufficient number of other measures appealing to different sections of the electorate. With the multiplication of groups, this evil is constantly increasing, and it is in this direction that many dangerous politicians are mainly working."

Page 288: "It would be a great gain to English politics if a capital question could be decided by the electorate on its own merits, on a direct and simple issue. If the nation is moving towards revolution, it should at least do so with its eyes open, and with a clear and deliberate intention.

"It would probably be found that such a vote would prove the most powerful bulwark against violent and dishonest change. It would bring into action the opinion of the great silent classes of the community, and reduce to their true proportions many movements to which party combinations or noisy agitations have given a wholly factitious prominence. It might restore in another form something of the old balanced Constitution, which has now so nearly passed away."

Page 289: "It would enable the nation to reject a measure which it dislikes, without destroying a ministry of which it approves."

"Few persons will doubt that a measure brought in this manner before the electorate would be voted on with a much fuller consideration and a much more serious sense of responsibility than if it came before them mixed up with a crowd of other meas-

ures, and inseparably connected with a party issue. At a general election, the great majority of votes are given for a party or a statesman, and the real question is, which side should rule the country. By the referendum the electorate can give its deliberate opinion, not upon men, but upon measures, and can reject a measure without placing the government of the country into other hands."

"If the electorate is to judge policies, it is surely less likely to err if it judges them on a clear and distinct issue. In such a case it is most likely to act independently, and not at the dictation of party wirepullers."

Page 291: "According to the theories which now prevail, the House of Commons has absolutely no right as against its electors, and it is to the electors that the referendum would transfer, in a far more efficient manner than at present, the supreme authority in legislation."

Page 292: "The experience, however, of Switzerland and America shows that, when the referendum takes root in a country, it takes political questions, to an immense degree, out of the hands of wirepullers, and makes it possible to decide them mainly, though perhaps not wholly, on their merits, without producing a change of government or of party predominance."

Page 294: "It seems to me, at least, certain that popular opinion is likely to be least dangerous if it is an unsophisticated opinion on a direct issue, as far as possible uninfluenced by agitators and professional politicians. It is very possible that its tendencies might be towards extreme conservatism; but the pendulum has moved so long and so violently in the opposite direction that a period of pause or even of reaction, might not appear an evil."

We refer also to Bryce's "American Commonwealth," 3d edition, vol. 1, chapter 39, from which we take the following pertinent extracts:

"The methods by which legislative power is directly vested in the American voters are four.

"The first is the enactment or amendment by them of a constitution. Here the likeness to the Swiss referendum is close because the particular provision to be enacted is first drafted and passed by the convention or legislature (as the case may be) and then submitted to the people.

"The second method is the submission to popular vote pursuant to the provisions of the constitution of a proposal or proposals therein specified. If such a proposal has been first passed by the legislature, we have here also a case resembling the Swiss referendum. If, however, the legislature have not given their decision on the proposal but the popular vote at the polls takes place in obedience to a direction in that behalf contained in the constitution, this is not strictly a referendum but a case of legislation by the people alone as if the voters of the State were all gathered in one assembly. Examples of this method in both its forms abound in the more recent constitutions. So far back as 1848 we find Wisconsin referring it to the voters to decide whether or not banks shall be chartered. Minnesota declares that a certain class of railway laws shall not take effect unless submitted to and ratified by a majority of the electors. And she provides by a later amendment to her constitution that 'the moneys belonging to the internal improvement land fund shall never be appropriated for any purpose until the enactment for that purpose shall have been approved by a majority of the electors of the State voting at the annual general election following the passage of the act.' In this last instance the referendum goes the length of constituting the voters the ultimate financial authority for the State, withdrawing from the legislature what might seem the oldest and most essential of its functions. So, in not a few States no debts beyond a certain specified amount may be contracted except in pursuance of a vote of the people; and in others the rate of taxation is limited by fixing it to a certain ratio to the total valuation of the State, subject to a power to increase the same by popular vote. And in California no law changing the seat of State government is valid unless approved by the people.

"The third and fourth methods are more recent than either of the preceding and mark a further long step in the extension of direct popular action. One is the true Swiss referendum, *i. e.*, the submission to the people for their approval or rejection all ordinary laws passed by the State legislature; the other, the Swiss initiative, *i. e.*, a power for a certain proportion of voters to propose ordinary laws or amendments to the State constitution. The State which has gone farthest in this path is Oklahoma, admitted to the Union in 1907. In her constitution (section 52): "The people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the legislature." * * *

"A number of States have now returned to the ancient scheme of vesting ordinary legislative power as well as constitution-making power in the whole body of citizens. The number of States which do this is increasing, for it finds favor as a legitimate development of the principle of popular sovereignty." * * *

"But the improvement of the legislatures is just what the Americans despair of or, as they prefer to say, have not time to attend to. Hence they fall back on the direct popular vote as the best course available under the circumstances of the case and in such a world as the present. Though some claim that it has an educative effect on the people, this is not the argument chiefly employed to advocate it. The ground taken is rather this, that the mass of the people are equal in intelligence and character to the average State legislator and are exposed to fewer temptations. The legislator can be got at; the people cannot. The personal interest of the individual legislator in passing a measure for chartering banks or spending the internal improvement fund may be greater than his interest as one of the community in preventing bad laws. It will be otherwise with the bulk of the citizens. * * * Nor should it be forgotten that in a country where law depends for its force on the consent of the governed it is eminently desirable that law should not outrun popular senti-

ment, but have the whole weight of the people's deliverance behind it." * * *

"Reference to the people may act as a conservative force; that is to say, there may be occasions when a measure which a legislature would pass either at the bidding of a heated party majority or to gain the support of a group of persons holding the balance of voting power, or under the covert influence of those who seek some private advantage will be rejected by the whole body of the citizens because their minds are cooler or their view of the general interest less biased by special predilection or interests." * * *

"The initiative and referendum are natural developments of the processes which began with the introduction into constitutions of what were really ordinary laws and no one can tell how far the new movement will spread." * * *

"In making the initiative and referendum parts of the regular machinery of government instead of applying the popular vote only to the amendment of constitutions, Oregon, Oklahoma, and other Western States above referred to have taken what may prove to be a momentous new departure, for the will of the sovereign people can through these methods express itself far more promptly and easily than heretofore. Some American publicists argue that to empower the people of a State to set aside their legislature when they are so disposed is virtually to abandon that 'republican form of government' which was in 1787 supposed to be identical with a representative form. This contention ceases to be plausible when it is remembered that the oldest republics in the world and many of the most famous were ruled by primary, not by representative, assemblies. A more serious question has been raised by those who doubt the wisdom of arrangements that leave so much to the vote of a multitude which may act hastily excited by the prospect of some benefit to be obtained, some grievance to be removed through a sweeping and perhaps insufficiently debated change in the law. The risk of careless and even reckless measures is undeniable, but they may in some States be just as likely to proceed

from a legislature as from the people voting at the polls, for the average of knowledge and judgment is not substantially lower among the voters than among those who compose the legislatures, and the safeguards provided by the rules restraining legislative action cannot always be relied upon.' * * *

INITIATIVE AND REFERENDUM IN SWITZERLAND.

We have not undertaken to discuss the initiative and referendum in Switzerland, important as such discussion might be from a historical point of view. We have to say, however, that there is a certain parallelism between the history of Switzerland in this respect and that of the United States. The earliest development of direct legislation among the Swiss was to be found at what was called Landsgemeinde, or gathering of the Cantons for the purpose of legislating and determining as one body all matters relating to their well-being. The evidences of the existence of such gatherings among the Swiss Cantons is to be found as early as the 14th century, while in the early part of the 19th century this institution, or some equivalent for it, had extended over practically all the Cantons of Switzerland.

The Swiss Constitution of 1848 embodied national direct legislation, and this was enlarged by the Constitution of 1874. These constitutions both recognized that it was the duty of the national government to guarantee to the several cantons a republican form of government, either representative or democratic, treating the expression "republican" as inclusive in its character. The form of the guaranty of 1874 follows that of 1848, being as follows (art. 6, chapter 1):

> "The Cantons are bound to ask of the Confederation the guaranty of their constitutions.
>
> "This guaranty shall be accorded, provided, * * * (*b*) That they assure the exercise of political rights according to republican forms, representative or democratic."

We find, therefore, that as in Switzerland direct legislation grew up from the Landsgemeinde until it embraced the whole nation, so up to this time in the United States similar legislation has developed from the town-meetings of New England until it is practiced in States containing populations almost as great as the whole United States at the time of the American Revolution.

The words of Charles Sumner in this respect seem particularly appropriate:

> "The towns of Massachusetts, like the municipalities of Switzerland, have been the schools and nurseries of freedom—in these small bodies men were early disciplined in those primal duties of citizenship which, on a grander scale, are made the foundation of our whole political system. * * * The true glory of the towns then was that they were organized on the principle of self-government when that principle was not generally recognized—that each town by itself was a little republic, where the whole body of freemen were voters, with powers of local legislation, taxation, and administration" (Vol. III, p. 246, of Lee & Shepard, 1874, edition of works).

It is not our intention at this time to multiply references indicating the success of the idea of direct legislation in Switzerland, but we cannot forbear from furnishing some of the more important ones.

Sir Francis Adams, former British Consul General in Switzerland, in his work entitled "The Swiss Confederation," on page 77 has the following to say:

> "The referendum and the initiative are the children of democracy, whose powerful weapons they have become.
>
> "The referendum means the reference, to all vote-possessing citizens either of the Confederation or of a Canton, for acceptance or rejection, of laws and resolutions framed by their representatives. The referendum has struck root and expanded wherever

it has been introduced, and no serious politician of any party would now think of attempting its abolition. The Conservatives, who violently opposed its introduction became its earnest supporters when they found that it undoubtedly acted as a drag net upon hasty and radical lawmaking. As to the moral effect which the exercise of this institution has had upon the people, we are assured that it is admitted to be salutary, even by adversaries of democratic government.

"The initiative is the exercise of the rights granted to any single voter or body of voters to initiate proposals for the enactment of new laws or for the alteration or abolition of existing laws. It is essentially a powerful engine in a democratic direction."

Hon. Theodore Curti, national councilor in Switzerland, says:

"The referendum works well in a great crisis. He mistakes who thinks the people will systematically reject proposed laws and that this obstructionist feeling will prevent their distinguishing good laws from bad ones."

EFFECTS OF A JUDGMENT FOR PLAINTIFF IN ERROR.

The application now being made to this court is extraordinary to the last degree. A private corporation, deeming itself aggrieved, asks this court in effect to overturn the legislative systems of eight States of the Union; to declare that these States, while apparently equal members of the Union with the other States, have in fact excluded themselves and are living under systems of laws antagonistic in spirit to those which should prevail in the American States.

It asks a decision, the effect of which would be, so far as this court is concerned, to nullify perhaps two score of important laws acquiesced in by millions of people.

It asks that this court may set a precedent which will justify the disregard of a number of constitutional amend-

ments which have received the sanction of thousands of our voters.

It asks that the Supreme Court of the United States shall travel far beyond the judicial limits set to it by the Constitution, by our traditions of government, by the practice of more than a hundred and twenty years, and assume to pass adversely to the expressed views of the executive and Congress, given upon purely political questions.

It has asked, for the logic of its position can be no less, that this court shall say that the people may not act directly upon any law, even though their power so to act be reserved by their constitution.

It has called upon this body to defeat the natural and peaceful evolution of republican institutions, and to inaugurate a reactionary revolution. Instead of permitting the forward movement of the people, under our Constitution, allowing freedom to grow with the growth of public intelligence, it would make of their constitutions something greater than the people creating them, bands stronger than iron, preventing national progress.

It asks that, although two co-ordinate branches of the government, and although two successive Presidents have recognized the initiative and referendum as appropriate under a republican form of government, nevertheless, this court shall declare the contrary, and say in effect that in its opinion not only Oregon but seven other States of the Union are not such members of the American Commonwealth of States, as are contemplated by the Constitution; that their senators and representatives are wrongfully seated at the capitol; that when a President certifies to the official character of the officers of Oregon and seven other States of the Union, the utmost he is doing is to recognize them as *de facto* and not as *de jure* officers.

The fact is not to be overlooked that utterances of this court are simply statements of the law as between the parties

thereto, and that even though this Court could be induced in this case to hold that the initiative and referendum amendment to the constitution of Oregon was contrary to the Federal Constitution, *the amendment itself would still remain, and similar provisions would likewise remain in a number of other States.* Whether operative or inoperative in the courts, the constitutions, until the people have acted, would remain in the judgment of the appellant unrepublican, and the senators and representatives of the States in question still not entitled to retain or receive seats in Congress, and presidential certifications of the acts of civil officers continue to be certifications to the acts of those who were representing unrepublican States. The most vivid imagination will hardly suffice to picture the political and legal ills to follow upon the granting of the correctness of the appellant's position.

But above all, the moral and social ill resultant upon the declaration of the unconstitutionality of the initiative and referendum would be infinitely greater. To say that the people rule and in the next breath to say that they may not rule, save through representatives who may be faithless to their trust, or may fail to represent; to say that the evils committed by representatives through mistakes as to their mandate, through corruption, through official pressure, are beyond the control of the constituents, is to make popular government a mockery. To say that reforms may not be had save by the chance agreement of a majority of the legislature with a majority of the people, or, in the case of constitutional amendments, of two-thirds, or three-fifths, or three-fourths, or two successive legislatures with the popular majority, is to urge the placing in the way of natural and peaceful political progress of obstacles which may lead even to possibly dangerous irritation. If we would pretend to have a government of the people, we must be prepared to live up to our pretention and not to "keep the word of promise to the ear, to break it to our hope."

This brief is filed by the courtesy of the Hon. A. M. Crawford, Attorney General of the State of Oregon, and at the special instance of the State Grange of Oregon.

Respectfully submitted.

JACKSON H. RALSTON,
FRED'K L. SIDDONS,
WM. E. RICHARDSON,
Of Counsel for the State of Oregon.

FILED
OCT 30 1911

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1911.

NO. 68.

PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY, Plaintiff in Error,

vs.

THE STATE OF OREGON, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

BRIEF OF ELBERT W. MAJOR, ATTORNEY-GEN. ELECT OF THE STATE OF OREGON AMICUS CURIAE.

ELBERT W. MAJOR,
Attorney-Elect of the State of Oregon.

(21,415)

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1911.

NO. 36.

PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY, Plaintiff in Error,

vs.

THE STATE OF OREGON, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

BRIEF OF ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI, AMICUS CURIAE.

STATEMENT OF THE CASE.

This is a writ of error to review the action of the Supreme Court of the State of Oregon, affirming the judgment of the lower court against plaintiff in error and wherein the State

of Oregon had recovered judgment against the Pacific States Telephone and Telegraph Company in an amount which was two per cent of the gross receipts of such company in the State of Oregon for the year 1906.

In 1903 the Legislature of the State of Oregon passed an act requiring all corporations, domestic and foreign, doing business in the State, to pay an annual license fee of from $10.00 to $200.00, according to their capital stock. (Laws 1903, p. 39.)

In 1906 there was proposed by an initiative petition and adopted by the people of the State of Oregon in June of that year pursuant to the provisions of the initiative and referendum amendment to the Constitution, and without reference to the Legislature, an act requiring telephone and telegraph companies to pay a license of two per cent per annum on the gross receipts of the company, and requiring such corporations to make annual statements to the State Treasurer of the amount of such receipts as a basis for such tax. The plaintiff in error is an Oregon corporation and made its return required by the act adopted in June, 1906, under the initiative and referendum, but refused to pay the tax thereon. Judgment was had in favor of the State for the proper sum under the new act.

Plaintiff in error complains of the action of the Supreme Court of the State of Oregon, and says that error was committed, and that the law enacted by and through the initiative and referendum is invalid, because legislation cannot be had in that way and that by reason thereof said law is repugnant to several provisions of the Constitution of the United States. The initiative and referendum amendment to the Constitution of Missouri is a verbatim copy of the initiative and referendum amendment to the Constitution of the State of Oregon, and for that reason, alone, Missouri, through its Attorney-General, files a brief, *amicus curiae*.

SPECIFICATIONS OF ERRORS.

Plaintiff in error in the trial court and in the Supreme Court of the State of Oregon, specifically complained that the initiative and referendum amendment to the Constitution of Oregon, under which the act of 1906 was proposed and adopted, was unconstitutional and void, because repugnant (1) to sections 2, 3, 4 and 8 of article I of the Constitution of the United States; (2) and to section 1, article II of said Constitution; (3) and to sections 3 and 4 of article IV of said Constitution; (4) and to article V of said Constitution; (5) and to article VI of said Constitution; (6) and to section 1 of the Fourteenth Amendment to the Constitution of the United States; (7) and also to the Congressional Act of February 14th, 1859, admitting Oregon to the Union, and other Congressional Acts.

Out of these several assignments of error the principal assignment upon which plaintiff in error relied is that the initiative and referendum amendment violates section 4 of article IV of the Constitution of the United States, and wherein the United States guarantees to every State in the Union a Republican form of government.

POINTS AND AUTHORITIES.

I.

The question of what government is the established one in a State and whether or not that government is a *"Republican form of government"* is not a *judicial* one but a *political* one, and *Congress alone* passes on and determines that fact and its decision is *binding on every other department of the Federal Government*, and such questions cannot be inquired into or passed upon by a judicial tribunal.

Luther v. Borden, 7 How. 1, 12 Law Ed. 581.

Texas v. White, 7 Wall, 700, 19 Law Ed. 227.

Taylor v. Beckham, 178 U. S. 548, 44 Law Ed. 1187.

II.

The initiative and referendum amendments to the Constitution of the states are entirely agreeable to a Republican form of government, and are not in violation of section 4, article IV of the Constitution of the United States.

Cadderly v. Portland, 44 Ore. 118.

Hopkins v. Duluth, 81 Minn. 189.

People ex rel. Elder v. Sours, 31 Colo. 369.

Davis v. State, 141 Ala. 84.

People ex rel. Muckle v. Board, 35 N. Y. Supp. 659.

Rippey v. Texas, 193 U. S. 504, 48 L. Ed. 767.

Noffzigger v. McAllister, 12 Kas. 315.

Griffin v. Martin, 7 Barb. 297.

Smalley v. Rutherford County, 122 N. C. 607.

State v. Kline, 50 Oregon 426.

Oregon v. Pacific States Tel. & Tel. Co. 53 Ore. 162.

Ex parte Phfaler, 88 Pac. 270, 11 (New series) L. R. A. 1092.

III.

Legislation submitting questions to voters has universally been upheld.

Upham v. Sutter County, 8 Cal. 379.

People ex rel. Caldwell v. Reynolds, 10 Ill. 1.

People ex rel. Love v. Nally, 49 Cal. 480.

People ex rel. Graves v. McFadden, 81 Cal. 494.

Ex parte Christensen, 85 Cal. 213.

People v. Ontario, 148 Cal. 625.

State ex rel. Barber v. District Court, 90 Minn. 457.

Rippey v. Texas, 193 U. S. 504, 48 Law Ed. 767.

IV.

Whether a statute is repugnant to the State Constitution is not a Federal question, but one which belongs exclusively to the State court, and the decision of that court is conclusive here. The decision of the Supreme Court of the State of Oregon that the initiative and referendum does not violate

any of the constitutional provisions of the State of Oregon is conclusive upon this Honorable Court in that respect.

Poyras de la Laude v. Louisiana, 18 How. 192.

Re Kemmler, 136 U. S. l. c. 447.

Rassmussen v. Idaho, 181 U. S. l. c. 200.

Merchants Bank v. Pennsylvania, 167 U. S. l. c. 462, 463.

Smiley v. Kansas, 196 U. S. l. c. 454.

Cargill Co. v. Minnesota, 180 U. S. 466.

Waters-Pierce Oil Co. v. Texas, 177 U. S. l. c. 42.

Missouri Pacific Ry. Co. v. Nebraska, 164 U. S. l. c. 414.

BRIEF AND ARGUMENT.

I.

CONGRESS ALONE DETERMINES WHAT GOVERNMENT IS THE ESTABLISHED ONE IN A STATE AND WHETHER OR NOT THAT GOVERNMENT IS A REPUBLICAN FORM OF GOVERNMENT AND ITS DECISION IS BINDING ON EVERY OTHER DEPARTMENT OF THE FEDERAL GOVERNMENT.

As to whether or not a State had at the time of its admission or now has a "Republican form of government" is a political question, the determination of which rests solely with Congress to decide. And when the Senators and Representatives of a State are *admitted into the counsels of the Union the authority of the government under which they are elected or appointed, as well as its republican character,* is recognized by the proper constitutional authority. The decision and action of Congress is binding on every other department of the government and the same cannot be questioned in a judicial tribunal. The right to decide such questions rests in Congress and is not placed in the courts.

The Supreme Court of the United States, in addressing itself to this specific subject, through Mr. Chief Justice Taney, in the case of Luther v. Borden, 7 Howard l. c. 42, said:

> "Under this article of the Constitution (section 4, article IV) it rests with Congress to decide what government is the established one in a State. For as the United States guaranteed to each State

> a republican government, Congress must necessarily decide what government is established in a State before it can determine whether it is republican or not. And when the Senators and Representatives of a State are admitted into the counsels of the Union the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government and could not be questioned in a judicial tribunal.
>
> "It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no Senators or Representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts."

Here we have a plain declaration from this Honorable Court that the right to decide not only what government is the established one in a State but as well *its republican form or character,* rests solely in Congress, and that its decision is binding or its actions tantamount thereto are binding and neither question can be raised in a judicial tribunal.

In the case of Texas v. White, 7 Wall. at 730, 19 Law Ed. i. c. 239, this court said:

> "But the power to carry into effect the clause of guaranty is primarily a legislative power, and resides in Congress."

Therefore the only *forum* which can determine whether or not there exists in the State of Oregon a *republican form of government is Congress.* Congress admitted Oregon into the Union. By that act it determined that Oregon had a Republican form of government. It will not be necessary to cite authorities sustaining the position that it is presumed that a Republican form of government still exists in that State.

The fact that Congress in its last session permitted Senators Chamberlain and Bourne and the Congressmen elected from Oregon to participate in the official work of Congress and occupy their seats and places in both branches of Congress is a conclusive determination and recognition and concession on the part of Congress that Oregon *now has a republican form of government and that the initiative and referendum amendment to the Constitution of Oregon in no wise interfered with or destroyed that republican form of government*, and every other department of the Federal Government, including the courts, are by said action of Congress bound upon that question and as specifically held by the Supreme Court of the United States in the case of Luther v. Borden, *supra*.

The Supreme Court in that case said that when the Senators and Representatives of a State were *admitted into the counsels of the Union, that is Congress*, the authority of the government and its *republican character* is recognized by the proper constitutional authority. It said further that the action of Congress in so permitting them to sit in the counsels of the Union, or in other words to occupy their seats and act officially as Senators and Representatives, was a sufficient determination as to the character or republican form of the government of that State. What more need be said? What more can be said? The plaintiff in error stands in the wrong forum and cannot be heard even if there were any merit whatever in its contention.

As long as Congress permits the Senators and the Representatives from the State of Oregon to occupy their places and to officially participate in its proceedings and pays to them their salaries and appoints them upon committees, that is a continuing determination, day by day, by that legislative body that the State of Oregon *continues* to have a republican form of government and that the same is in no wise affected

by the initiative and referendum and its determination and its said acts can in no wise be challenged or questioned in any judicial proceedings in any court in the land.

A State court is without authority to pass upon the question whether or not the State government is or is not a republican form of government as guaranteed by the Federal Constitution. Suppose a State should complain that it does not have a republican form of government, to what forum would it go? Unquestionably not to the courts, but to Congress, that forum in which such question are determined, that conduit through which the guarantee from the Federal government to the States must be reached.

The guarantee of a republican form of government to each State in the United States Constitution under article IV, section 4, gives no jurisdiction to the Supreme Court of the United States on writ of error to consider such question. In addition to the case of Luther v. Borden, the Supreme Court of the United States spoke upon the question again in the famous case of Taylor v. Beckham. Mr. Chief Justice Fuller in that case in the 178th U. S. l. c. 579, said:

> "It was long ago settled that the enforcement of this guarantee belonged to the political department. Luther v. Borden, 7 How. 1, 12 L. Ed. 581. In that case it was held that the question which of the two opposing governments of Rhode Island, namely, the charter government or the government established by voluntary convention was the legitimate one, was a question for the determination of the political department."

Mr. Calhoun expressed the opinion, 2 Story on Constitution, page 591, that "The Federal Government in determining whether the government of a State be or be not republican within the meaning of the Constitution, has no right what-

ever in any case to look beyond its admission into the Union." Judge Cooley says (cited in Story on Constitution, 5th Ed. Vol. 2, pages 592, 593) that:

> "This view so forcibly presented is that which was practically accepted and acted upon up to the time when it became necessary to recognize and reconstruct State governments in the states which went in the rebellion in 1861. By some leading men in Congress it was then contended that a government ought not to be regarded as republican in form which permitted slavery or which excluded a portion of its citizens from participation in the government because of the color of the skin. The exigencies of the times made this doctrine acceptable. The reorganizing states were required to present constitutions forbidding slavery and establishing impartial suffrage.
>
> "In the course of reconstructing however, the question was warmly discussed whether if the political department for the government should erroneously, arbitrarily and for partisan ends, determine and declare that a particular State government was not republican in form, and therefore should not be recognized, such State or its citizens should have any appeal to the judicial tribunals. It was not doubted that if the case was one of a newly organized State applying for admission to the Union, the decision of Congress upon its admission, however erroneous, unjust or arbitrary would be one the conclusiveness of which would not be open to discussion. Congress having full power to admit or reject new states, the insufficiency of the reasons which may have governed its action cannot possibly affect its validity. But

> in other cases also it must be conceded that a State aggrieved by an unjust decision is equally without legal remedy. The courts cannot aid it, for upon political questions they must accept and follow the conclusions of the political department."

II.

THE INITIATIVE AND REFERENDUM AMENDMENT TO THE CONSTITUTION OF THE STATE OF OREGON IS IN HARMONY WITH ITS REPUBLICAN FORM OF GOVERNMENT AND IS NOT VIOLATIVE OF SECTION 4, ARTICLE IV OF THE CONSTITUTION OF THE UNITED STATES.

Aside from the fact that the courts have no right to pass upon the question whether or not a State has a republican form of government, but that that authority is vested solely in Congress, a full consideration of the initiative and referendum amendment discloses that it is in perfect harmony with and is entirely agreeable to a "Republican form of government," as guaranteed by the Constitution of the United States.

Section 4, article IV of the Constitution of the United States providing this guarantee is as follows:

> "The United States shall guarantee to every state in this Union a republican form of government and shall protect each of them against invasion; and on application of the Legislature or through the executive (when the legislature cannot be convened) against domestic violence."

Plaintiff in error makes his principal complaint and assignment that the initiative and referendum amendment im-

pinges upon this constitutional provision. This section of the Constitution was prepared by the Committee of Detail. In the Articles of Confederation entered into by the States prior to the Constitutional Convention in which was drafted and adopted the Constitution of the United States, there was no guarantee that each State should have a republican form of government, and that Confederation, aptly referred to as a rope of sand, for this and many other reasons was ineffective. For this and by reason of the further fact of the domestic troubles and insurrections which occurred in the State of Massachusetts in 1787 and which threatened to overthrow the State government, it was deemed best by the framers of the present Constitution to give a Federal guarantee as to the form of government and as to invasions and domestic violence.

Mr. Wilson, of the Constitutional Convention, who drafted section 4 of article IV, stated at the time that "The object of the resolution is merely to secure the states against dangerous commotion, insurrections and rebellions." (Watson on the Constitution, Vol. II, p. 1283.)

WHAT IS A REPUBLICAN FORM OF GOVERNMENT?

It would be well to ascertain what constitutes "A republican form of government." By what standard is it measured? In the case of Chisholm v. Georgia, 2 U. S. at 457, Mr. Justice Wilson, who was a member of the Constitutional Convention, said:

> "A republican government, within the meaning of the term as used in the Constitution of the United States, is one constructed on the principle that the supreme power resides in the body of the people."

In this we find that the measure of what constitutes a republican form of government is whether or not the *Supreme power resides in the body of the people.* As long, then, as the

supreme power is lodged in the body of the people the formula through which they may exercise that power is immaterial.

When the Constitution of the United States was adopted all of the several States had Constitutions of their own except Rhode Island. It continued to act under its charter from the Crown. An examination of the Constitutions of the States at that time discloses that in no state were all of its citizens permitted to vote. Each state determined for itself who should have that power. The right to vote eminates not from the Federal Government but from the States. It comes from the State Constitutions and not from the Federal Constitution.

In discussing what was a "Republican form of government" the Supreme Court of the United States, through Mr. Chief Justice Waite in Minor v. Happersett, 21 Wall. 162, said:

> "The guarantee is of a republican form of government. No particular government is designated as republican. Neither is the exact form to be guaranteed in any manner especially designated."

The distinguishing feature of a republican form of government is the right of the people to choose their own officers for governmental administration and to express their legislative will either through representatives in the Legislature who act as their agents or in a direct way, such as the initiative and referendum.

In the case of Downs v. Bidwell, 182 U. S. 1. c. 279, Mr. Justice Brown, speaking for the court, said:

> "Indeed the practical interpretation put by Congress upon the Constitution has been long continued and uniform to the effect that the Constitution is applicable to territories acquired by purchase or conquest, only when and so far as Congress shall

> so direct. Notwithstanding its duties to 'guarantee to every State in this Union a republican form of government' (Art. IV, Sec. 4) by which we understand, according to the definition of Webster, 'A government in which the supreme power resides in the whole body of the people, and is exercised by representatives elected by them,' Congress did not hesitate in the original organization of the territories of the Louisiana, Florida and the Northwest Territory, and its subdivisions of Ohio, Indiana, Michigan, Illinois and Wisconsin, and still more recently in the case of Alaska, to establish a form of government bearing a much greater analogy to a British Crown colony than a Republican State of America, and to vest the legislative power either in a Governor and counsel or a Governor and judges to be appointed by the President."

This decision in addition to being pertinent to the form of government meant by a republican form of government is an additional authority that Congress alone can determine and does determine when a state has a republican form of government.

The benefits of the guarantee provided in the Federal Constitution that each state should have a republican form of government was stated by Mr. Madison in The Federalist (The Federalist, No. 43) in the following language:

> "In a Confederacy founded on republican principles and composed of republican members the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchial innovations. The more intimate the nature of such a union may be, the greater interest

> have the members in the political institutions of each other; and the greater right to insist, that the forms of government under which the compact was entered into should be *substantially* maintained. * *
>
> "Whenever the States may choose to substitute *other republican forms,* they have a right to do so and to claim the Federal guarantee for the latter. The only restriction imposed on them is, that they shall not exchange republican for anti-republican constitutions; a restriction which it is presumed will hardly be considered as a grievance."

Here we find that the States may substitute *other republican forms* and in doing so would have the right to claim the Federal protection as to the substituted forms. In other words, there is no particular form prescribed. There is no fixed standard which must be applied.

No one can have a grievance because a republican form of government becomes more republican. No one can complain because the people have an enlarged right and a fuller exercise and mode of expressing the supreme powers lodged in them. The forms of government as to each state are to be merely a *substantial* compliance with the constitutional provision. The closer the government comes to the people and the more prolific the opportunities for them to express the *supreme power* lodged in them the more *perfectly* it touches the fundamental principles upon which rests the American Republic.

"A republican form of government" is a government contradistinguished from an aristocracy or a monarchy. The framers of the Constitution who had just come from under a monarchial form of government wished to preserve the power of government in the body of the people and guard against the springing up of an aristocracy or a monarchy.

EVIDENCES OF A REPUBLICAN FORM OF GOVERNMENT.

The enactment of laws by the representatives of the people in a State Legislature is but one evidence of a republican form of government. It is not the only evidence. There is no set, prescribed formula which shall constitute the political dose or become the sole standard to determine what is and what is not a republican form of government. When you have that form which permits the body of the people to express the supreme power through their representatives and express their authority and will through them, this is a limited republican form of government. When the supreme power or authority vested in the people to enact laws and express their will rests both in the Legislature and also in the people by and through the initiative and referendum we then have a republican form of government in a less limited way. It is merely a matter of degree. Good, better, best, republican, more republican, most republican.

The people of the State may choose at any time to substitute other republican forms for those which they now have and as stated by Mr. Madison. The States are not bound to any particular form. A substantial compliance is the requirement.

The initiative and referendum does not in any way interfere with the republican form of government of the States having adopted the same. Those States continue to legislate through their legislative bodies and enact laws which become effective upon the approval or signing of the Governor. The adoption of the initiative and referendum does not do away with the Legislature nor interfere with it in the least. It does not curtail nor interfere with the legislative prerogatives. It is merely an *enlargment of the legislative branch*

of the State government. The people certainly have a right so to do.

Therefore it does not abolish "The most numerous branch of the State Legislature," spoken of in section 2 of article I of the Constitution of the United States. That branch is left in existence and it may convene or adjourn or take its recess just as the law provides and in these things is in no wise affected by the adoption of the initiative and referendum amendment. The initiative and referendum amendment specifically provides that, "This section shall not be construed to deprive any member of the legislative assembly of the right to introduce any measure."

The Federal Constitution requires the Legislature of the States to do and perform certain things. These things can be done only by the Legislature and are in no sense interfered with.

Section 10 of article I of the Constitution of the United States, and the 13th, 14th and 15th articles of amendment thereto lay certain prohibitions upon the States. These prohibitions together with the powers conferred upon Congress by section 8 of article I and other provisions of the Constitution constitute the authority resting in the Federal Government. There is nothing contained in any of these provisions granting certain powers and rights to the Federal Government or going as a matter incident thereto or specifically denied to the State that would preclude the States or any one of them from adopting the initiative and referendum amendment.

That the adoption of the initiative and referendum does not in any manner impinge upon section 4, article IV of the Constitution of the United States guaranteeing to every state a republican form of government is fully answered in the case of Cadderly v. Portland, 44 Oregon, 118, wherein the court said:

"Nor do we think the amendment void because in conflict with the Constitution of the United States, article IV, Sec. 4, guaranteeing to every State a republican form of government. The purpose of this provision of the Constitution is to protect the people of the several states against aristocratic and monarchial invasions, and against insurrections and domestic violence, and to prevent them from abolishing a republican form of government: Cooley, Const. Lim. (7 Ed.) 45; 2 Story, Const. (5 Ed.) Sec. 1815. But it does not forbid them from amending or changing their constitution in any way they may see fit, so long as none of these results is accomplished. No particular style of government is designated in the constitution as republican, nor is its exact form in any way prescribed. A republican form of government is a government administered by representatives chosen or appointed by the people or by their authority. Mr. Madison says it is 'a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior.' The Federalist, 302. And in discussing the section of the Constitution of the United States now under consideration, he says: 'But the authority extends no further than to a guaranty of a republican form of government, which supposes a pre-existing government of the form which is to be guarantied. As long, therefore, as the existing republican forms are continued by the States, they are guarantied by the Federal Constitution. Whenever the states may choose to substitute other republican forms, they have a right to do so, and to claim the Federal guar-

anty for the latter. The only restriction imposed on them is that they shall not exchange republican for anti-republican constitutions:' The Federalist, 342. Now the initiative and referendum amendment does not abolish or destroy the republican form of government, or substitute another in its place. The representative character of the government still remains. The people have simply reserved to themselves a larger share of legislative power, but they have not overthrown the republican form of the government, or substituted another in its place. The government is still divided into the legislative, executive and judicial departments, the duties of which are discharged by representatives selected by the people.

"Under this amendment, it is true, the people may exercise a legislative power, and may, in effect, veto or defeat bills passed and approved by the legislature and the Governor; but the legislative and executive departments are not destroyed, nor are their powers or authority materially curtailed. Laws proposed and enacted by the people under the initiative clause of the amendment are subject to the same constitutional limitations as other statutes, and may be amended or repealed by the legislature at will.

"The veto power of the Governor is not abridged in any way, except as to such laws as the legislature may refer to the people. The provision of the amendment that 'the veto power of the Governor shall not extend to measures referred to the people' must necessarily be confined to the measures which the legislature may refer, and cannot apply to acts upon which the referendum may be invoked by petition. The Governor is required, under the Con-

stitution, to exercise his veto power, if at all, within five days after the act shall have been presented to him, unless the general adjournment of the legislature shall prevent its return within that time, in which case he shall exercise his right within five days after the adjournment. He must necessarily act, therefore, before the time expires within which a referendum by petition on any act of the legislature may be invoked, and before it can be known whether it will be invoked or not. Unless, therefore, he has a right to veto any act submitted to him, except such as the legislature may specially refer to the people out of the safeguards against hasty or ill-advised legislation which is everywhere regarded as essential is removed—a result manifestly not contemplated by the amendment."

The various assignments of error on the part of plaintiff in error are also fully answered in the well considered case of Ex parte Andrew Pfahler, 88 Pacific, p. 270. This involved the Initiative and Referendum provisions in the municipal charter of the city of Los Angeles, California. The Supreme Court of California, in addressing itself to the constitutionality of said Initiative and Referendum, among other things, said:

> "Petitioner's claim is that the purported ordinance has never been legally enacted. The ordinance was not adopted in the ordinary way, by a vote of the city council and approval of the mayor, but by the electors of the city at a general election, at which it was submitted for their approval or rejection; such submission having been compelled by a petition submitted to the council, signed by electors equal in number to at least 5 per cent of the

vote cast for all candidates for mayor at the last preceding election. The procedure was in strict accord with what is known as the 'initiative' provision of the charter of Los Angeles, which, together with what is known as the 'referendum,' was made a part of such charter by amendments ratified by the people of such city at an election held December 1, 1902, and approved by the Legislature of the State on January 30, 1903. (See Stat. 1903, pp. 555, 572.) The real question presented by this proceeding is, then, as to the validity of this provision of the charter.''

''The latter objection may appropriately be first considered. Its sole foundation is section 4, article 4 of the Constitution of the United States, which is as follows: 'The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and, on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.' The contention here is, necessarily, that any attempt by a state to provide for a direct exercise of legislative power by the people, instead of by representatives of the people, elected or appointed for that purpose, is, even in purely local affairs, inconsistent with the republican form of government guaranteed by this provision, and ineffectual for any purpose; the theory being that such provision requires a purely representative form of government, not only in the state itself, but also in all its subdivisions, leaving no vestige of power of direct legislation in the people themselves. If we assume that this claim presents a judicial question, rather than a political one

to be determined by the Congress of the United States (see, however, Luther v. Borden, 7 How. 1, 12, 11 L. R. A. (N. S.) L. ed. 581; Taylor v. Beckham, 178 U. S. 548, L. ed. 1187, 20 Sup. Ct. Rep. 1009). We are brought to a consideration of the question as to what was meant by this guaranty of a republican form of government. For all the purposes of this proceeding it is sufficient to hold, as we do, that it does not prohibit the direct exercise of legislative power by the people of a subdivision of a state in strictly local affairs. In saying this, we do not wish to be understood as intimating that the people of a state may not reserve the supervisory control as to general state legislation afforded by the initiative and referendum, without violating this provision of the Federal Constitution. That they may do so has been decided by the Supreme Court of Oregon in the case of Kadderly v. Portland, 44 Ore. 118, 74 Pac. 710, 75 Pac. 222, which appears to be the only case in which the question has been directly presented. See, also, Hopkins v. Duluth, 81 Minn. 189, 83 N. W. 536."

"These two amendments, the initiative and referendum, have the same effect in this respect. In each it is the vote of the electors at the ballot box that finally determines whether or not a proposed measure shall be a law at all, and it can make no difference, in principle, whether the proposition originates with electors or with the council. In each the electors by their vote at the ballot box directly exercise legislative power. By these amendments the electors are, except in certain specified cases, given an effectual veto power as to all ordinances approved by the council, and are clothed with au-

> thority, paramount to that of the council, to directly enact such local legislation as they may deem expedient, where the council declines to enact the same. The charter provision relative to the initiative, which is substantially similar to recently enacted provisions in the charters of other municipalities of the State, is vigorously attacked by counsel for petitioner and other attorneys appearing as amici curiae, who claim to see in this curbing of the power of the ordinary legislative body of the city, the vesting in the electors of a municipality the power to enact measures which the legislative body refuses to approve, a violation of our own Constitution, and a forbidden departure from the republican form of government guaranteed by the Constitution of the United States."

The principles announced in these two decisions in reference to section 4, article IV of the Constitution of the United States are also supported by the following cases:

Hopkins v. Duluth, 81 Minn. 189.

People ex rel. Elder v. Sours, 31 Colo. 369.

Davis v. State, 141 Ala. 84.

Rippey v. Texas, 193 U. S. 504.

People ex rel. v. Board, 35 N. Y. Supp. 659.

Noffzigger v. McAllister, 12 Kan. 315.

Griffin v. Martin, 7 Barb. 297.

State v. Kline, 50 Oregon 426.

It would seem that the initiative and referendum in no wise violates or impinges upon section 4, article IV of the Constitution, and it would serve no useful purpose to prolong the discussion upon that point.

III.

THE AMENDMENT DOES NOT VIOLATE EITHER THE FIFTH ARTICLE OR THE SIXTH ARTICLE OF THE FEDERAL CONSTITUTION.

Under the provisions of the fifth article to the Constitution of the United States the Legislatures of two-thirds of the several states may call a convention for proposing amendments to the Constitution of the United States, and which shall be valid when ratified by the Legislatures of three-fourths of the several states or by conventions in three-fourths thereof as the one or the other mode of ratification may be proposed by Congress.

Under this provision these proposed amendments to the Constitution of the United States come through the Legislatures and are ratified by the Legislatures or conventions in three-fourths of the states.

The initiative and referendum does not interfere with this constitutional provision. The Legislatures in the various states adopting the same are still left intact and perform their functions as before. Amendments to the Federal Constitution cannot be proposed through the initiative nor ratified by the referendum and the amendment to the Oregon Constitution does not contemplate any such innovation.

Neither does the initiative and referendum prevent the Constitution of the United States from being "the supreme law of the land," as provided in article VI of the Federal Constitution. Neither does it prevent the Senators and Representatives of the Federal Government and of the various states and the executives and judicial officers from being bound by an oath or affirmation to support the Constitution of the United States and as provided in said article.

IV.

THE INITIATIVE AND REFERENDUM DOES NOT VIOLATE ANY OF THE OTHER PROVISIONS OF THE FEDERAL CONSTITUTION NOR ACTS OF CONGRESS. ON THE OTHER HAND, THE AMENDMENTS TO THE FEDERAL CONSTITUTION WOULD INDICATE AND CLEARLY SUSTAIN THE RIGHT OF THE PEOPLE OF A STATE TO ADOPT SUCH A PROVISION.

NINTH ARTICLE OF AMENDMENT.

In the adoption of the Constitution of the United States there was no "Bill of Rights" in that instrument. The first ten amendments to the Constitution were therefore intended to be a general Bill of Rights. The ninth amendment came about by reason of the writings of Mr. Hamilton. This amendment provides as follows:

> "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained *by the people.*"

Thus we see that by this article nothing in the Federal Constitution could be construed so as to deny or disparage the rights retained by the people. The committee of eleven had left out of this article of amendment the word "deny," but the special committee of three added the word, and as it is now found in the amendment. (Thorpe's Constitutional History of the United States, Vol. II, page 258.)

Watson on the Constitution, Vol. 2, p. 1523.

TENTH ARTICLE OF AMENDMENT.

The tenth article of amendment provides as follows:

> "The powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively, *or to the people.*"

This amendment was the last amendment introduced by Mr. Madison. As originally introduced the words "*or to the people*" did not appear. This was added while the amendment was under consideration in the House. (1 Annals 453, Watson on Const., Vol. 2, p. 1524.) It is one of the most important of the original amendments and specifically protects the rights of the states *or the people.* It considers both the state and the people.

Only such powers were delegated to the United States as are set forth in the Constitution or as were necessary to the effective exercise of the powers granted. All other powers and authority vested in the states at the time and which were not forbidden in the Constitution the states reserved not only to themselves but to *the people.* The phrase "*or to the people*" was added to the amendment for *some purpose,* and some purpose must be attributed to the amendment. That purpose was to reserve to the people certain rights which they might exercise and the people have exercised that right reserved to them in the adoption of the initiative and referendum.

The *amendments* to the Constitution crystallized the fundamental principles of common law, upon which rest personal liberty and rights, into constitutional provisions. They constitute and are known as the "Bill of Rights," and relate to those personal rights and guarantees which are the *basis*

of personal liberty and which under our form of government must be guaranteed to every person in our organic law.

In the case of Robertson v. Baldwin, 117 U. S. l. c. 281, Mr. Justice Brown said:

> "The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guarantees and immunities which we had inherited from our English ancestors and which had from time immemorial been subject to certain well recognized exceptions arising from the necessities of the case."

In the case of Brown v. New Jersey, 175 U. S. l. c. 174, the court, having under consideration certain amendments to the Federal Constitution, the late Mr. Justice Brewer, in speaking for the court, said:

> "The first ten amendments to the Federal Constitution contain no restrictions on the powers of the states, but were intended to operate *solely* on the Federal Government."

As the first ten amendments under the decisions of the Supreme Court of the United States are not limitations on the powers of the states but operate solely on the Federal Government, how is it possible for the initiative or the referendum or the two as found in the Constitution of Oregon to violate or impinge upon any of the said ten amendments. It would be idle to discuss a question which is no longer open to discussion, and has not been for at least seventy-five years.

The eleventh, twelfth, thirteenth and fifteenth articles of amendment to the Constitution of the United States can

have nothing to do whatever with the question under consideration. Neither does the initiative and referendum impinge upon the fourteenth article of amendment. It does not "abridge the privileges or immunities of citizens of the United States," nor does it "deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws," but on the other hand gives greater rights and privileges to the citizens of Oregon and gives them greater security as to their liberty and property.

Congress has recognized all these facts. It has and does recognize the right of any state to adopt the initiative and referendum, and that to do so would not change it from a Republican form of government. Had it deemed otherwise, Congress would have unquestionably enacted a law declaring that no state in the Union would be permitted to propose to enact laws through the initiative or ratify laws through the referendum.

Mr. Wilson, who was a member of the Federal Convention and who was afterwards one of the Justices of the Supreme Court of the United States and who was also a member of the convention of Pennsylvania which ratified the Constitution used this language (2 Elliott's Debates, 497-98.)

> "This is not a government founded upon compact; it is founded upon the power of the people. They express in their name and their authority, 'we, the people, do ordain and establish, etc.'"

There is a division of the supreme powers of the government between the states in their *united capacity* and constituting the Federal government and the states in their *individual capacities.* We have a dual government. Two governmental powers operating at the same time, in the same state, on the same persons and property and each sovereign within its jurisdiction.

This Honorable Court to whom comes for final arbitrament vital questions, has throughout the years held steadfast to this principle and has preserved the powers and rights of each of the two governments and has, in perfect harmony, driven them in tendem. The Federal Government exercises the powers which affect the people of all the states alike (Cardwell v. Bridge Co., 113 U. S. 210), while the states exercise the powers that are local are domestic in their application and the extent of the jurisdiction of these two separate sovereignties was firmly fixed by the people in the adoption of the Constitution of the United States.

V.

WHETHER A STATUTE, IN THIS INSTANCE AN ACT THROUGH THE INITIATIVE, IS REPUGNANT TO THE STATE CONSTITUTION IS NOT A FEDERAL QUESTION, BUT ONE WHICH BELONGS EXCLUSIVELY TO THE STATE COURT AND THE DECISION OF THAT COURT IS CONCLUSIVE IN THE SUPREME COURT OF THE UNITED STATES.

The assignment that the initiative and referendum, and the laws enacted thereunder are violative of the constitutional provisions of the State of Oregon, are not reviewable here. The decision of the Supreme Court of the State of Oregon upon those questions became final and is binding upon this Honorable court. The application of this rule is so uniformly recognized as to admit of no denial in any case.

In passing upon this question the court, in Re Kimmler, 136 U. S. 1. c. 447, said:

> "The decision of the State court, sustaining the validity of the act under the State Constitution, is not re-examinable here."

Again in Rassmussen v. Idaho, 181 U. S. l. c. 200, the court said:

> "The judgment of the Supreme Court of Idaho establishes that there was no conflict between this legislation and the Constitution of the State, and it is not within the province of this court to review that question."

Also, in the case of Merchants Bank v. Pennsylvania, 167 U. S. l. c. 462, 463, the late Mr. Justice Brewer in delivering the opinion of the court, declared:

> "It is sufficient to say in reference to this contention that the decision of the Supreme Court of the State of Pennsylvania, sustaining the statute is conclusive in this court, as to any question of conflict between it and the State Constitution."

To the same effect are the following decisions:

Layton v. Missouri, 187 U. S. 356.

Transportation Co. v. Mobile, 187 U. S. 479.

Montana Company v. St. L. M. & M. Co., 152 U. S. 160.

Bridge Co. v. Dix, 6 How. 507.

Adams Express Co. v. Ohio, 165 U. S. 194.

For the reasons herein expressed and deeming it needless to further discuss the validity of the initiative and referendum amendment to the Constitution of the State of Oregon and the correctness of the decision of the Supreme Court of that state, we respectfully suggest that the writ of error be dismissed and the judgment affirmed. Respectfully submitted,

ELLIOTT W. MAJOR,
Attorney-General of the State of Missouri.

APPENDIX.

JOINT AND CONCURRENT RESOLUTION submitting to the qualified voters of Missouri an amendment to the Consitution thereof concerning the initiative and referendum.

Be it resolved by the Senate, the House of Representatives concurring therein:

That at the general election to be held in this state on the first Tuesday after the first Monday in November, 1908, there shall be submitted, for adoption, to the qualified voters of the state, the following amendment to the Constitution:

Section 1. The legislative authority of the state shall be vested in a legislative assembly, consisting of a senate and house of representatives, but the people reserve to themselves power to propose laws and amendments to the Constitution, and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly. The first power reserved by the people is the initiative, and not more than eight per cent of the legal voters in each of at least two-thirds of the congressional districts in the state shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the secretary of state not less than four months before the election at which they are to be voted upon. The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health, or safety and laws making appropriations for the current expenses of the

state government, for the maintenance of the state institutions and for the support of the public schools) either by the petition signed by five per cent of the legal voters in each of at least two-thirds of the congressional districts in the state, or by the legislative assembly, as other bills are enacted. Referendum petitions shall be filed with the secretary of state not more than ninety days after the final adjournment of the session of the legislative assembly which passed the bill on which the referendum is demanded. The veto power of the governor shall not extend to measures referred to the people. All elections on measures referred to the people of the state shall be had at the biennial regular general elections, except when the legislative assembly shall order a special election. Any measure referred to the people shall take effect and become the law when it is approved by a majority of the vote(r)s cast thereon, and not otherwise. The style of all bills shall be: "Be it enacted by the people of the state of Missouri." This section shall not be construed to deprive any member of the legislative assembly of the right to introduce any measure. The whole number of votes cast for justice of the supreme court at the regular election last preceding the filing of any petition for the initiative, or for the referendum, shall be the basis on which the number of legal voters necessary to sign such petition shall be counted. Petitions and orders for the initiative and for the referendum shall be filed with the secretary of state, and in submitting the same to the people he, and all other officers, shall be guided by the general laws and the act submitting this amendment, until legislation shall be especially provided therefor.

Ratified November 3, 1908, by the electors of Missouri.

PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY *v.* OREGON.

ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

No. 36. Argued November 3, 1911.—Decided February 19, 1912.

The enforcement of the provision in § 4 of Art. IV of the Constitution that the United States shall guarantee to every State a republican form of government is of a political character and exclusively committed to Congress, and as such is beyond the jurisdiction of the courts.

The provisions of § 4 of Art. IV of the Constitution do not authorize the judiciary to substitute its judgment as to a matter purely political for the judgment of Congress on a subject committed to Congress.

Under § 4 of Art. IV of the Constitution, it rests with Congress to decide what government is the established one in a State, and its decision is binding on every other department of the Government, and cannot be questioned by the judiciary. *Luther* v. *Borden*, 7 How. 1.

A statute otherwise constitutional cannot be attacked in the courts on the ground that it was adopted in pursuance of provisions in the constitution of the State which render the form of government of the State unrepublican in form within the meaning of § 4 of Art. IV of the Constitution. The courts have no jurisdiction of the question; it is for Congress to determine.

Where the claim that one taxed under a state statute is deprived of property without due process of law is not based on any inherent defect in the law, or infirmity of power of State to levy it, but on the ground that the government of the State is not republican in form, the question is not within the jurisdiction of the courts.

The judicial power of the United States will not be extended so as to interfere with the authority of Congress or of the Executive so as to make the guarantee contained in § 4 of Art. IV of the Constitution one of anarchy instead of order. *Luther* v. *Borden*, 7 How. 1.

Whether the adoption of provisions for the initiative and referendum in the constitution of a State, such as those adopted in Oregon in 1902, so alter the form of government of the State as to make it no longer republican within the meaning of § 4 of Art. IV of the Con-

stitution, is a purely political question over which this court has no jurisdiction.

Writ of error to review 53 Oregon 162, dismissed.

THE facts, which involve the constitutionality under § 4 of Art. IV of the Federal Constitution of the initiative and referendum provisions of the constitution of the State of Oregon, are stated in the opinion.

Mr. E. S. Pillsbury, with whom *Mr. Oscar Sutro* was on the brief, for plaintiff in error:

The initiative and the tax measure in question are repugnant to the equal protection provision of the Fourteenth Amendment.

That Amendment controls the action of all branches of the Government, legislative, executive and judicial. *Ex parte Virginia*, 100 U. S. 339–347; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373; *Scott* v. *McNeal*, 154 U. S. 34; *Blake* v. *McClung*, 172 U. S. 232.

The initiative act under which the license tax is claimed in this suit was "enacted" by a vote of 69,635 in favor of the same and 6,441 against. The total vote for Governor at this election was 96,751 so that 20,675 of the electors did not vote on this measure.

To compel plaintiff in error to pay this tax would not accord to it the equal protection of the laws, nor the protection of equal laws, because this exaction is peculiar to plaintiff in error, and the few others included in these two acts, and is based upon alleged legislation which, for said period, is entirely different in character and in the manner of enactment, from that which pertains to the taxation of all other residents of the State who have only been subject to tax laws passed by the Legislative Assembly.

The power of taxation belongs exclusively to the legislative branch of the Government; it is lodged nowhere else. *United States* v. *New Orleans*, 98 U. S. 392.

The citizens of the United States receive from the Federal Government the protection of the rights which are conferred upon them by their national citizenship. The majority of the people of a State cannot, even by amendment of the State's organic law, encroach upon these privileges. *United States* v. *Cruikshank*, 92 U. S. 542, 549.

Legislation by representatives elected for that purpose is the distinguishing feature of a republican form of government.

The duty to provide a republican form of government was originally assumed by the States; and it still remains there. And the maintenance of the right is guaranteed to the people of the States by the National Government. Const., U. S., Art. IV, § 4; *Texas* v. *White*, 7 Wall. 730.

Every citizen of the United States is entitled to the protection of the Federal Government in his right to be governed by laws enacted only by representatives elected for that purpose, and in accordance with a republican form of government. Such is the "law of the land." Const., U. S., art. IV, § 6.

As to meaning of the phrase "the law of the land," see *University of Maryland* v. *Williams*, 9 Gill & J. 365, 412; *Murray* v. *Hoboken Land Co.*, 18 How. 272; *Ex parte Virginia*, 100 U. S. 339; *Ex parte Ah Fook*, 49 California, 402; *Allgeyer* v. *Louisiana*, 165 U. S. 578.

The edicts of a multitude could not be the basis of due process, however fair the steps prescribed. Laws must emanate from the law-making power, and in a constitutional republic that power can only be a representative legislature created in accordance with the organic law.

The acts of a state legislature will not be declared unconstitutional unless in violation of some constitutional provision. The same principle must be applied to the acts of the States exercising their residuary sovereignty through any other of the departments of government, or through the people directly. *Holden* v. *Hardy*, 169 U. S.

389; *Loan Association* v. *Topeka*, 20 Wall. 655; *C. W. & Z. R. R. Co.* v. *Clinton County*, 1 Oh. St. 77, 87; *Parker* v. *Commonwealth*, 6 Barr. 507; and see *Maynard* v. *Commissioners*, 84 Michigan, 228, 239; *Commissioners* v. *Moir*, 199 Pa. St. 534; *People* v. *Hurlbut*, 24 Michigan, 44.

An oligarchy or a democracy is equally unrepublican; each was equally hateful to the founders of our government, and each is equally subversive of the structure which they erected. *Lexington* v. *Thompson* (Ky.), 68 S. W. Rep. 477; *Downes* v. *Bidwell*, 182 U. S. 244. And see *Wilkinson* v. *Leland*, 2 Pet. 657; *Terrett* v. *Taylor*, 9 Cranch, 43; *Bradshaw* v. *Rogers*, 20 Johns. 102; *Camp* v. *Rogers*, 44 Connecticut, 291; *State* v. *Williams College*, 9 Gill & J. 365; *People* v. *Humphrey*, 23 Michigan, 471.

Apart from the guaranty clause, all citizens of the United States may demand government in conformity with republican principles; No. 84 of the Federalist Hamilton; XII Hamilton's Works, 327; Madison, "Federalist" No. 44; XI Hamilton's Works, 370; 3 Elliott's Debates, 451; *Minor* v. *Happersett*, 21 Wall. 161; *United States* v. *Cruikshank*, *supra*.

The initiative is in contravention of a republican form of government. Government by the people directly is the attribute of a pure democracy and is subversive of the principles upon which the republic is founded. Direct legislation is, therefore, repugnant to that form of government with which alone Congress could admit a State to the Union, and which the State is bound to maintain.

For difference between a republic and democracy, see Webster's Dictionary; *Downes* v. *Bidwell*, 182 U. S. 279; Cooley's Const. Lims. 194; *Minor* v. *Happersett*, 21 Wall. 162; *In re Duncan*, 139 U. S. 461; 15 Jefferson's Writings, 452; Burgess, Pol. Science and Compar. Const. Law, Vol. I; Black's Const. Law, 28; Bartlett, Digest Election Cases, 446; *Ex parte Farnsworth*, 135 S. W. Rep. 537;

1 Story, Const. 388; *Ex parte Anderson*, 134 California, 74; Yeaman's, "Study of Government."

The direct exercise of the powers of government by the people at large would remove from a republic the feature which distinguishes it from a democracy. That government cannot be said to be representative in which the people at large are the legislators. *People* v. *Collins*, 3 Michigan, 343, 399; *State* v. *Swisher*, 17 Texas, 441; *Rice* v. *Foster*, 4 Harr. 479; *Ex parte Wall*, 48 California, 279; *State* v. *Harris*, 2 Bailey, 598; Federalist, No. 51.

In ascertaining the meaning of the phrase "republican form of government" the debates of the constitutional conventions and the Federalist papers are of great importance, if not conclusive. *McCullough* v. *Maryland*, 4 Wheat. 419; *Cohens* v. *Virginia*, 6 Wheat. 418; *Pollock* v. *Farmers' Tr. Co.*, 158 U. S. 601; *McPherson* v. *Blacker*, 146 U. S. 1; *Rhode Island* v. *Massachusetts*, 12 Pet. 657.

The framers of the Constitution recognized the distinction between the republican and democratic form of government, and carefully avoided the latter. "Federalist," No. 48; XII Hamilton's Works, 28; 2 Elliott's Debates, 253; 5 Elliott's Debates, 136 *et seq.;* and see 3 Elliott's Debates, 225, 233, for views of John Marshall, afterwards Chief Justice.

The extent of territory of the States alone sufficed, in the judgment of the framers of the Constitution, to condemn the establishment of a democratic form of government. Federalist, No. XIV; Hamilton's Works, Vol. XI, 101, 103; Madison in Federalist, No. X; Hamilton's Works, Vol. XI, 75.

The form of state government perpetuated by the Constitution was the republican form with the three departments of government, in force in all the States at the time of the adoption of the Constitution. 5 Elliott's Debates, 239.

Initiative legislation is invalid because government by

the people directly is inconsistent with our form of government.

The vital element in a republican form of government, as that phrase is used in American political science, is representation. Legislation by the people directly is the very opposite, the negative of this principle. It can, therefore, have no place in our form of government. Indeed, it has been repeatedly said to be contrary to and subversive of the structure of our republic. *In re Duncan, supra; State* v. *Swisher*, 17 Texas, 448; *Rice* v. *Foster*, 4 Harr. (Del.) 479; *Clarke* v. *Rochester*, 28 N. Y. 606, 633.

The well-known practices of adopting state constitutions by popular vote, and of local legislation in "town meetings" furnish no precedent for the lodgment of legislative power in the ballot-box.

The Federal Constitution presupposes in each State the maintenance of a republican form of government and the existence of state legislatures, to wit: representative assemblies having the power to make the laws; and that in each State the powers of government will be divided into three departments: a legislature, an executive and a judiciary, one of these, the legislature, is destroyed by the initiative.

State legislatures are a vital feature of our government; the Federal Constitution presupposes their existence and imposes on each State the obligation to maintain them.

The division of powers of the three departments in each of the States is a prerequisite to the National Government.

Under the Constitution the state legislatures are the agency to carry on the relations between the Nation and the States.

The word "legislature" in the Constitution means a representative assembly consisting of two houses, empowered to make the law. Such was its meaning at the time of the adoption of the Constitution.

Words and terms are to be taken in the sense in which

they were used when the Constitution was adopted. *Veazie Bank* v. *Fenno*, 8 Wall. 542; *Locke* v. *New Orleans*, 4 Wall. 172; *United States* v. *Harris*, Abb., U. S. 110; *United States* v. *Block*, 4 Sawy. 211; *Fox* v. *McDonald*, 101 Alabama, 51; Bancroft, Hist. of U. S. IX, 260 *et seq.*; *Evansville* v. *The State*, 118 Indiana, 426, 441.

Contemporaneous legislation by Congress sheds some light on the meaning of the term "legislature" as used in the Constitution. The initiative destroys the legislative assemblies or legislatures which it is the implied obligation of each State to maintain, for a legislature must be the law-making power.

Unless supreme within its jurisdiction a legislative assembly is not a legislature. Blackstone, Comm., Vol. I, 46; Law of the Const. 66; Federalist, Nos. 33, 75.

Two coördinate legislative authorities, each with equal power of making, repealing and amending laws, would be political anarchy and chaos.

The initiative overthrows one of the greatest safeguards against the abuse of the power of legislation, to wit: the system of a dual legislative assembly.

The provision in the Oregon constitution for direct legislation violates the provisions of the Act of Congress admitting Oregon to the Union. Act of Congress, February 14, 1859, 11 Stat. 383; *Romine* v. *State*, 34 Pac. Rep. 925; *People* v. *Adams*, 73 Pac. Rep. 866.

The State of Oregon was admitted because its proposed government was republican. The implied contract was that the State would continue that form. Every person within the State is entitled to that form of government. The State cannot secede from the Union. A change in its fundamental law, repugnant to republican institutions, is contrary to the act of Congress admitting the State, and is an impairment of the obligation of the State to preserve a republican form of government. Tiedeman, Unwritten Const. of the U. S. 164.

It is the power of this court to maintain and preserve this government against the attack of direct legislation and the absolutism of numbers.

The questions whether the "measure" in issue constitutes due process of law and affords plaintiff in error the equal protection of the law, and whether this "measure" in the method of its enactment violates the various provisions of the Federal Constitution designated in the opening brief, are contentions which this court must decide in the exercise of its jurisdiction and are not political.

Luther v. *Borden*, 7 How. 1; *Texas* v. *White*, 7 Wall. 730; *Taylor* v. *Beckham*, 178 U. S. 548; *In re Duncan*, 139 U. S. 449; *Hopkins* v. *Duluth*, 81 Minnesota, 189, cited by defendant in error, do not sustain the contention that the questions are political and not within the jurisdiction of this court.

The courts have never held that a cause was not justiciable because it involved an interpretation of Art. IV, § 4, but have in proper cases construed the language of that clause. *Chisholm* v. *Georgia*, 2 Dall. 419; *In re Duncan*, 139 U. S. 449; *Hopkins* v. *Duluth*, 81 Minnesota, 189; *In re Pfahler*, 150 California, 71; *People* v. *Sours*, 31 Colorado, 369; *Kadderly Case*, 44 Oregon, 118; *People* v. *Johnson*, 38 Colorado, 76; *Elder* v. *Colorado*, 86 Pac. Rep. 250; aff'd, 204 U. S. 85; *Forsyth* v. *Hammond*, 166 U. S. 519; *South Carolina* v. *United States*, 199 U. S. 437, 454.

The right to a republican form of government is a substantial right. Like the franchise to vote, it is a political right. This has always been held to be within the protection of the courts. *Capen* v. *Foster*, 12 Pick. 485, 489; *Yick Wo* v. *Hopkins*, 118 U. S. 369; *Florida* v. *Georgia*, 17 How. 478, 494; *Virginia* v. *West Virginia*, 11 Wall. 54; *Boyd* v. *Thayer*, 143 U. S. 135; *Cohens* v. *Virginia*, 6 Wheat. 378.

If from the questions it appears that some title, right,

privilege or immunity on which the recovery depends will be defeated by one construction of the Constitution or law of the United States or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States, otherwise not. *Starin* v. *New York City*, 115 U. S. 257; *Osborn* v. *Bank of United States*, 9 Wheat. 824; *Mayor* v. *Cooper*, 6 Wall. 252; *Tennessee* v. *Davis*, 100 U. S. 264; *Railroad Co.* v. *Mississippi*, 102 U. S. 140; *Kansas Pac. R. R.* v. *Atchison R. R. Co.*, 112 U. S. 416; *Cooke* v. *Avery*, 147 U. S. 384, 385; *Consolidated Gas Co.* v. *Willcox*, 212 U. S. 19, 40.

The action of Congress in receiving Senators and Representatives from Oregon and its approval of a constitution containing the initiative as providing a republican form of government does not control this court in the construction of the language of the Oregon constitution, or in passing upon the validity of any provision or amendment to that constitution. *Gunn* v. *Barry*, 12 Wall. 610; *Homestead Cases*, 22 Gratt. 266; *Coyle* v. *Smith*, 221 U. S. 559; *McPherson* v. *Blacker*, 146 U. S. 1; *Texas* v. *White*, 7 Wall. 725.

The court has jurisdiction because the Oregon amendment providing for the initiative and the "measure" in question deny due process of law and the equal protection of the law. *Davidson* v. *New Orleans*, 96 U. S. 97; *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Southwestern Tel. & Tel. Co.* v. *City of Dallas*, 134 S. W. Rep. 321; *Telephone Co.* v. *Los Angeles*, 211 U. S. 280.

The power to impose taxes has in our Government always been vested exclusively in the legislative department. It is a political axiom that the taxing power must be exercised by the legislative arm of the Government or by its authority: *Meriwether* v. *Garrett*, 102 U. S. 472, 501; *Heine* v. *The Levee Commissioners*, 19 Wall. 655; *Munday* v. *Rahway*, 43 N. J. L. 346; Cooley, Taxation, 32, 34; *Spencer* v. *Merchant*, 125 U. S. 345, 355.

The guarantee of equal protection of the law is a guarantee of the protection of equal laws. *Southern Railway Co.* v. *Greene*, 216 U. S. 412; *Yick Wo* v. *Hopkins*, 118 U. S. 369.

The unconstitutionality of the acts of a State are equally within the jurisdiction of the courts, whether they be the acts of the legislative or executive department or of the people themselves, adopting their constitutions or amending them. *Cohens* v. *Virginia*, 6 Wheat. 415; *Dodge* v. *Woolsey*, 18 How. 332; *Cummings* v. *Missouri*, 4 Wall. 277; Cooley, Const. Lim., 7th ed. 62; *Koehler* v. *Hill*, *supra*.

Mr. John J. Dye and *Mr. Addison C. Harris*, submitted a brief as *amici curiæ*, by leave of the court, in support of the contentions of the plaintiff in error.

Mr. A. M. Crawford, *Mr. George Fred Williams* and *Mr. Jackson H. Ralston*, with whom *Mr. S. H. Van Winkle*, *Mr. W. S. U'Ren* and *Mr. C. E. S. Wood* were on the brief, for defendant in error:

The power to determine whether a State has a republican form of government is vested in Congress. Hence it is a political rather than a judicial question. *Luther* v. *Borden*, 7 How. 1, 42; *Texas* v. *White*, 7 Wall. 700, 730; *Taylor* v. *Beckham*, 178 U. S. 548, 578; *Hopkins* v. *Duluth*, 81 Minnesota, 189; Article by W. A. Coutts, Vol. VI, No. 4, 304, Michigan Law Review; *In re Duncan*, 139 U. S. 449.

If the question is a judicial one, courts of the United States will follow the decision of the state courts, where the state court has passed upon the question. *Luther* v. *Borden*, 7 How. 1, 40; *Leeper* v. *State of Texas*, 139 U. S. 462–467.

The Federal authorities, including the Supreme Court, have treated this as a political question. 7 How. 1, 42; Cooley on Const. Lim., 7th ed., p. 59, 6th ed., p. 42.

This question does not lose its political complexion because it has arisen since the admission of Oregon into the Union of States. If the courts take jurisdiction of these questions, then we have a decision upon a political question, decided by the political power, reëxamined by the judicial and perhaps overthrown. One branch of the Government becomes arrayed against another, and revolution or rebellion is imminent.

It is not a decision upon one clause of the Constitution, but the whole instrument is examined and considered, and the plan or scheme of government there outlined adjudged to be republican, or anti-republican, in character.

The State of Oklahoma was recently admitted into the Union with the initiative and referendum principles reserved to the people. See §§ 2, 3, 5, Oklahoma Constitution.

While a court may decide whether an amendment of a constitution has been adopted in the prescribed manner, and whether it denies any constitutional right, either as to property or person, it would be an invasion of the prerogatives of Congress should the court below undertake to decide whether the constitution of a new State seeking admission is republican in form, and to decide whether it should become a member of the Union.

If the court decides to retain jurisdiction: A state constitution should not be held to contravene the Federal Constitution unless the general scope and plan of government provided in the former is opposed to the general scope and plan of government required by the latter, to be maintained by the State. The initiative and referendum amendment is essentially republican in form as guaranteed in the Federal Constitution, construed in the light of the following authorities: Cooley, Const. Lim., 7th ed., 59; *Id.*, 6th ed., 42, 45; Federalist, Hamilton ed., No. 39, p. 301; No. 43, p. 342; Oberholtzer on the Referen-

dum in America, Chap. 45, pp. 368 and 369; 2 Story, Const. 5th ed., §§ 1815 to 1819, both inclusive; 1 Elliott's Debates, 406; 5 *Id.* 160; 15 Writings of Thomas Jefferson, p. 17 (see Vol. XI, Federal Ed., p. 529); *Chisholm* v. *Georgia*, 2 Dallas, 419, 457; *In re Duncan*, 139 U. S. 449, 461; *Luther* v. *Borden*, 7 How. 42; *Minor* v. *Happersett*, 21 Wall. 162, 175; *Taylor* v. *Beckham*, 178 U. S. 548, 578; *Hopkins* v. *Duluth*, 81 Minnesota, 189; *People* v. *Sours*, 31 Colorado, 369, 383; *In re Andrew Pfahler*, 150 California, 71, 77, 78; *Ex parte Wagner*, 21 Oklahoma, 33, 36; *Kadderly* v. *Portland*, 44 Oregon, 118, 144; *Oregon* v. *Pac. States Tel. Co.*, 53 Oregon, 162; *Straw* v. *Harris*, 54 Oregon, 424, 431; *Kring* v. *Missouri*, 107 U. S. 221.

The members of the Federal convention considered a "republican form of government" to be a government which derived all its powers from the great body of the people.

Both the Federal and state courts have uniformly held that the initiative method of enacting laws was not repugnant to the provisions of § 4, Art. IV, of the Federal Constitution, either directly or by necessary inference. *Chisholm* v. *Georgia*, 2 Dall. 419, 457; *In re Duncan*, 139 U. S. 449, 461; *Minor* v. *Happersett*, 21 Wall. 162, 175; *Hopkins* v. *Duluth*, 81 Minnesota, 189; *People* v. *Sours*, 31 Colorado, 369, 383; *In re Andrew Pfahler*, 150 California, 71, 77, 78; *Kadderly* v. *Portland*, 44 Oregon, 118; 74 Pac. Rep. 710; *Oregon* v. *Pac. States T. & T. Co.*, 53 Oregon, 162; 99 Pac. Rep. 427; *Straw* v. *Harris*, 54 Oregon, 424, 431.

The executive and legislative branches of the Federal Government have held, in substance, that the reservation of the initiative and referendum powers by the people of a State is not violative of the Federal Constitution nor hostile to a republican form of government. Senators and representatives from States reserving those powers are seated in the Senate and House of Representatives without protest. When new States are admitted, the President and

Congress pass upon the form of government presented by the proposed State, and decide whether the same is in harmony with the Constitution of the United States, and they have in several cases approved state constitutions reserving the identical powers attacked in the case at bar, notably, Oklahoma and Arizona, and other States have changed their constitutions to include those powers, to-wit: South Dakota, Utah, Colorado, Arkansas, Maine and Oregon, without objection from any Federal authority, and no question has ever been raised as to their representation in Congress.

Also the right of the people to instruct their representatives in Congress and in the state legislatures, if it exists, is an admission or acknowledgment that the supreme power rests in the people, and we contend that such right does exist.

Inexpediency should not be considered. That is for the law-making power of the State.

The act does not violate any of the provisions of § 1 of the Fourteenth Amendment.

Assuming that the act under consideration was lawfully enacted the taxes levied thereby must be considered a valid exercise of the taxing power of the State in the light of the following authorities: *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114; *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237; *Home Ins. Co.* v. *New York*, 134 U. S. 594; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 562; *Kentucky R. Tax Case*, 115 U. S. 321, 337; *Magoun* v. *Illinois Savings Bank*, 170 U. S. 283, 294; *Am. Sugar Ref. Co.* v. *Louisiana*, 179 U. S. 89; *Cargill Co.* v. *Minnesota*, 180 U. S. 452, 468; *Cook* v. *Marshall County*, 196 U. S. 261, 268, 273, 274; *Armour Packing Co.* v. *Lacy*, 200 U. S. 226, 235; *Delaware Railroad Tax Case*, 18 Wall. 206, 231; 2 Cooley on Taxation, 3d ed., 1095; *City of St. Joe* v. *Ernst*, 8 S. W. Rep. (Mo.) 558; *Producers Oil Co.* v. *Texas*, 99 S. W. Rep. (Tex.) 157; *State Tax on R. R. Gross Receipts*, 15 Wall. 284, 293.

It cannot be claimed in this case that a tax on gross earnings is even incidentally a tax on interstate commerce.

Mr. George H. Shibley, Director of the American Bureau of Political Research of People's Rule League of America; *Mr. Robert L. Owen*, United States Senator from Oklahoma, Chairman of the National Committee, People's Rule League of America, and *Mr. J. Henry Carnes* as counsel, for the State of Oregon, filed a brief for the defendant in error.

Mr. George Fred Williams, as counsel for the States of California, Arkansas, Colorado, South Dakota and Nebraska, filed a separate brief for defendant in error.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

We premise by saying that while the controversy which this record presents is of much importance, it is not novel. It is important, since it calls upon us to decide whether it is the duty of the courts or the province of Congress to determine when a State has ceased to be republican in form and to enforce the guarantee of the Constitution on that subject. It is not novel, as that question has long since been determined by this court conformably to the practise of the Government from the beginning to be political in character, and therefore not cognizable by the judicial power, but solely committed by the Constitution to the judgment of Congress.

The case is this: In 1902 Oregon amended its constitution (Art. IV, § 1). This amendment while retaining an existing clause vesting the exclusive legislative power in a General Assembly consisting of a senate and house of representatives added to that provision the following: "But the people reserve to themselves power to propose laws and amendments to the constitution and to enact or

reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly." Specific means for the exercise of the power thus reserved was contained in further clauses authorizing both the amendment of the constitution and the enactment of laws to be accomplished by the method known as the initiative and that commonly referred to as the referendum. As to the first, the initiative, it suffices to say that a stated number of voters were given the right at any time to secure a submission to popular vote for approval of any matter which it was desired to have enacted into law, and providing that the proposition thus submitted when approved by popular vote should become the law of the State. The second, the referendum, provided for a reference to a popular vote, for approval or disapproval, of any law passed by the legislature, such reference to take place either as the result of the action of the legislature itself or of a petition filed for that purpose by a specified number of voters. The full text of the amendment is in the margin.[1]

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[1] Section 1 of Article IV of the constitution of the State of Oregon shall be and hereby is amended to read as follows:

SECTION 1. The legislative authority of the state shall be vested in a legislative assembly, consisting of a senate and house of representatives, but the people reserve to themselves power to propose laws and amendments to the constitution and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly. The first power reserved by the people is the initiative, and not more than eight per cent of the legal voters shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the secretary of state not less than four months before the election at which they are to be voted upon. The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health, or safety)

In 1903 (Feby. 24, 1903, Gen. Laws 1903, p. 244) detailed provisions for the carrying into effect of this amendment were enacted by the legislature.

By resort to the initiative in 1906 a law taxing certain classes of corporations was submitted, voted on and promulgated by the Governor in 1906 (June 25, 1906, Gen. Laws 1907, p. 7) as having been duly adopted. By this law telephone and telegraph companies were taxed, by what was qualified as an annual license, two per centum upon their gross revenue derived from business done within the State. Penalties were provided for non-payment, and methods were created for enforcing payment in case of delinquency.

The Pacific States Telephone and Telegraph Company, an Oregon corporation engaged in business in that State, made a return of its gross receipts as required by the

either by the petition signed by five per cent of the legal voters, or by the legislative assembly, as other bills are enacted. Referendum petitions shall be filed with the secretary of state not more than ninety days after the final adjournment of the session of the legislative assembly which passed the bill on which the referendum is demanded. The veto power of the governor shall not extend to measures referred to the people. All elections on measures referred to the people of the state shall be had at the biennial regular general elections, except when the legislative assembly shall order a special election. Any measure referred to the people shall take effect and become the law when it is approved by a majority of the votes cast thereon, and not otherwise. The style of all bills shall be: "Be it enacted by the people of the state of Oregon." This section shall not be construed to deprive any member of the legislative assembly of the right to introduce any measure. The whole number of votes cast for justice of the supreme court at the regular election last preceding the filing of any petition for the initiative or for the referendum shall be the basis on which the number of legal voters necessary to sign such petition shall be counted. Petitions and orders for the initiative and for the referendum shall be filed with the secretary of state, and in submitting the same to the people he, and all other officers, shall be guided by the general laws and the act submitting this amendment, until legislation shall be especially provided therefor. (1 Lord's Oregon Laws, p. 89.)

statute and was accordingly assessed two per cent. upon the amount of such return. The suit which is now before us was commenced by the State to enforce payment of this assessment and the statutory penalties for delinquency. The petition alleged the passage of the taxing law by resort to the initiative, the return made by the corporation, the assessment, the duty to pay and the failure to make such payment.

The answer of the corporation contained twenty-nine paragraphs. Four of these challenged the validity of the tax because of defects inhering in the nature or operation of the tax. The defenses stated in these four paragraphs, however, may be put out of view, as the defendant corporation, on its own motion, was allowed by the court to strike these propositions from its answer. We may also put out of view the defenses raised by the remaining paragraphs based upon the operation and effect of the state constitution as they are concluded by the judgment of the state court. Coming to consider these paragraphs of the answer thus disembarrassed, it is true to say that they all, in so far as they relied upon the Constitution of the United States, rested exclusively upon an alleged infirmity of the powers of government of the State begotten by the incorporation into the state constitution of the amendment concerning the initiative and the referendum.

The answer was demurred to as stating no defense. The demurrer was sustained, and the defendant electing not to plead further, judgment went against it and that judgment was affirmed by the Supreme Court of Oregon. (53 Oregon, 162.) The court sustained the conclusion by it reached, not only for the reasons expressed in its opinion, but by reference to the opinion in a prior case (*Kadderly* v. *Portland*, 44 Oregon, 118, 146), where a like controversy had been determined.

The assignments of error filed on the allowance of the writ of error are numerous. The entire matters covered

by each and all of them in the argument, however, are reduced to six propositions, which really amount to but one, since they are all based upon the single contention that the creation by a State of the power to legislate by the initiative and referendum causes the prior lawful state government to be bereft of its lawful character as the result of the provisions of § 4 of Art. IV of the Constitution, that "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence." This being the basis of all the contentions, the case comes to the single issue whether the enforcement of that provision, because of its political character, is exclusively committed to Congress or is judicial in its character. Because of their absolute unity we consider all the propositions together, and therefore at once copy them. We observe, however, that in the argument the second, fourth and fifth paragraphs, for the purposes of discussion, were subordinately classified, and these subordinate classifications we omit from our text, reproducing them, however, by a marginal reference.

I.

"The initiative and the tax measure in question are repugnant to the provisions of section 1 of the Fourteenth Amendment to the Constitution of the United States which forbids a State to deny to any person within its jurisdiction the equal protection of the law.

II.

"The initiative amendment and the tax in question, levied pursuant to a measure, passed by authority of the initiative amendment, violates the right to a republican

form of government which is guaranteed by section 4, article IV, of the Federal Constitution.[1]

III.

"Taxation by the initiative method violates fundamental rights and is not in accordance with 'the law of the land.' (U. S. Const., Art. VI).

IV.

"The initiative is in contravention of a republican form of government. Government by the people directly is the attribute of a pure democracy and is subversive of the principles upon which the republic is founded. Direct legislation is, therefore, repugnant to that form of government with which alone Congress could admit a State to the Union and which the State is bound to maintain.[2]

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[1] 1. The guaranty of article IV, section 4, of the Federal Constitution is to the people of the States, and to each citizen, as well as to the States as political entities.

2. Section 4 of article IV therefore prohibits the majority in any State from adopting an unrepublican constitution.

[2] 1. Difference between a republic and democracy.

2. In ascertaining the meaning of the phrase "republican form of government" the debates of the constitutional conventions and the federalist papers are of great importance, if not conclusive.

3. The framers of the Constitution recognized the distinction between the republican and democratic form of government, and carefully avoided the latter.

4. The extent of territory of the States alone sufficed, in the judgment of the framers of the Constitution, to condemn the establishment of a democratic form of government.

5. The form of state government perpetuated by the Constitution was the republican form with the three departments of government, in force in all the States at the time of the adoption of the Constitution.

6. The history of other nations does not furnish the definition of the phrase "republican form of government" as those words were used by the framers of the Constitution. They distinguish the American from all other republics by the introduction of the principle of representation.

V.

"The Federal Constitution presupposes in each State the maintenance of a republican form of government and the existence of state legislatures, to wit: Representative assemblies having the power to make the laws; and that in each State the powers of government will be divided into three departments: a legislature, an executive and a judiciary. One of these, the legislature, is destroyed by the initiative.[1]

VI.

"The provision in the Oregon constitution for direct legislation violates the provisions of the act of Congress admitting Oregon to the Union."

On the surface, the impression might be produced that the first and third propositions,—the one in words relating

7. Initiative legislation is invalid because government by the people directly is inconsistent with our form of government.

8. The well-known practices of (a) adopting state constitutions by popular vote, and of (b) local legislation in "town meetings," furnish no precedent for the lodgment of legislative power in the ballot-box.

[1] 1. State legislatures are a vital feature of our Government; the Federal Constitution presupposes their existence and imposes on each State the obligation to maintain them.

2. The division of powers of the three departments in each of the States is a prerequisite to the national Government.

3. It is evident under the Constitution the State Legislatures are the agency to carry on the relations between the Nation and the States.

4. The word "legislature" in the Constitution means a representative assembly consisting of two houses, empowered to make the law. Such was its meaning at the time of the adoption of the Constitution.

5. Contemporaneous legislation by Congress sheds some light on the meaning of the term "legislature" as used in the constitution.

6. The initiative destroys the legislative assemblies or legislatures which it is the implied obligation of each State to maintain, for a legislature must be the law-making power.

7. The initiative overthrows one of the greatest safeguards against the abuse of the power of legislation, to wit: the system of a dual legislative assembly.

to the equal protection clause of the Fourteenth Amendment, and the other in terms asserting "taxation by the initiative method violates fundamental rights, and is not in accordance with the law of the land," are addressed to some inherent defect in the tax or infirmity of power to levy it without regard to the guarantee of a republican form of Government. But this is merely superficial, and is at once dispelled by observing that every reason urged to support the two propositions is solely based on § 4 of Art. IV and the consequent inability of the State to impose any tax of any kind which would not violate the Fourteenth Amendment or be repugnant to the law of the land if in such State the initiative or referendum method is permitted. Thus dispelling any mere confusion resulting from forms of expression and considering the substance of things, it is apparent that the second proposition, which rests upon the affirmative assertion that by the adoption of the initiative and referendum the State "violates the right to a republican form of government which is guaranteed by section 4 of Article IV of the Federal Constitution," and the two subdivisions made of that proposition, the first that "the guarantee in question is to the people of the States and to each citizen, as well as to the States as political entities," and the second asserting "section 4 of Article IV therefore prohibits the majority in any State from adopting an unrepublican constitution," are the basic propositions upon which all the others rest. That is to say, all the others and their subdivisions are but inducements tending to show the correctness of the second and fundamental one. This conclusion is certain, as they all but point out the various modes by which the adoption of the initiative and referendum incapacitated the State from performing the duties incumbent upon it as a member of the Union or its obligations towards its citizens, thus causing the State to cease to be a government republican in form within the intendment of the

constitutional provision relied upon. In other words, the propositions each and all proceed alone upon the theory that the adoption of the initiative and referendum destroyed all government republican in form in Oregon. This being so, the contention, if held to be sound, would necessarily affect the validity, not only of the particular statute which is before us, but of every other statute passed in Oregon since the adoption of the initiative and referendum. And indeed the propositions go further than this, since in their essence they assert that there is no governmental function, legislative or judicial, in Oregon, because it cannot be assumed, if the proposition be well founded, that there is at one and the same time one and the same government which is republican in form and not of that character.

Before immediately considering the text of § 4 of Art. IV, in order to uncover and give emphasis to the anomalous and destructive effects upon both the state and national governments which the adoption of the proposition implies, as illustrated by what we have just said, let us briefly fix the inconceivable expansion of the judicial power and the ruinous destruction of legislative authority in matters purely political which would necessarily be occasioned by giving sanction to the doctrine which underlies and would be necessarily involved in sustaining the propositions contended for. First. That however perfect and absolute may be the establishment and dominion in fact of a state government, however complete may be its participation in and enjoyment of all its powers and rights as a member of the national Government, and however all the departments of that Government may recognize such state government, nevertheless every citizen of such State or person subject to taxation therein, or owing any duty to the established government, may be heard, for the purpose of defeating the payment of such taxes or avoiding the discharge of such duty, to assail in a court of justice the rightful exist-

ence of the State. Second. As a result, it becomes the duty of the courts of the United States, where such a claim is made, to examine as a justiciable issue the contention as to the illegal existence of a State and if such contention be thought well founded to disregard the existence in fact of the State, of its recognition by all of the departments of the Federal Government, and practically award a decree absolving from all obligation to contribute to the support of or obey the laws of such established state government. And as a consequence of the existence of such judicial authority a power in the judiciary must be implied, unless it be that anarchy is to ensue, to build by judicial action upon the ruins of the previously established government a new one, a right which by its very terms also implies the power to control the legislative department of the Government of the United States in the recognition of such new government and the admission of representatives therefrom, as well as to strip the executive department of that government of its otherwise lawful and discretionary authority.

Do the provisions of § 4, Art. IV, bring about these strange, far-reaching and injurious results? That is to say, do the provisions of that Article obliterate the division between judicial authority and legislative power upon which the Constitution rests? In other words, do they authorize the judiciary to substitute its judgment as to a matter purely political for the judgment of Congress on a subject committed to it and thus overthrow the Constitution upon the ground that thereby the guarantee to the States of a government republican in form may be secured, a conception which after all rests upon the assumption that the States are to be guaranteed a government republican in form by destroying the very existence of a government republican in form in the Nation.

We shall not stop to consider the text to point out how absolutely barren it is of support for the contentions sought to be based upon it, since the repugnancy of those con-

tentions to the letter and spirit of that text is so conclusively established by prior decisions of this court as to cause the matter to be absolutely foreclosed.

In view of the importance of the subject, the apparent misapprehension on one side and seeming misconception on the other suggested by the argument as to the full significance of the previous doctrine, we do not content ourselves with a mere citation of the cases, but state more at length than we otherwise would the issues and the doctrine expounded in the leading and absolutely controlling case—*Luther* v. *Borden,* 7 How. 1.

The case came from a Circuit Court of the United States. It was an action of damages for trespass. The case grew out of what is commonly known as the Dorr Rebellion in Rhode Island and the conflict which was brought about by the effort of the adherents of that alleged government sometimes described as "the government established by a voluntary convention" to overthrow the established charter government. The defendants justified on the ground that the acts done by them charged as a trespass were done under the authority of the charter government during the prevalence of martial law and for the purpose of aiding in the suppression of an armed revolt by the supporters of the insurrectionary government. The plaintiffs, on the contrary, asserted the validity of the voluntary government and denied the legality of the charter government. In the course of the trial the plaintiffs to support the contention of the illegality of the charter government and the legality of the voluntary government "although that government never was able to exercise any authority in the State nor to command obedience to its laws or to its officers," offered certain evidence tending to show that nevertheless it was "the lawful and established government," upon the ground that its powers to govern have been ratified by a large majority of the male people of the State of the age of 21 years and upwards and also by a large

majority of those who were entitled to vote for general officers cast in favor of a constitution" which was submitted as the result of a voluntarily assembled convention of what was alleged to be the people of the State of Rhode Island. The Circuit Court rejected this evidence and instructed the jury that as the charter government was the established state government at the time the trespass occurred, the defendants were justified in acting under the authority of that government. This court, coming to review this ruling, at the outset pointed out "the novelty and serious nature" of the question which it was called upon to decide. Attention also was at the inception directed to the far-reaching effect and gravity of the consequences which would be produced by sustaining the right of the plaintiff to assail and set aside the established government by recovering damages from the defendants for acts done by them under the authority of and for the purpose of sustaining such established government. On this subject it was said (p. 38):

"For, if this court is authorized to enter upon this inquiry as proposed by the plaintiff, and it should be decided that the charter government had no legal existence during the period of time above mentioned, if it had been annulled by the adoption of the opposing government, then the laws passed by its legislature during that time, were nullities; its taxes wrongfully collected; its salaries and compensation to its officers illegally paid; its public accounts improperly settled; and the judgments and sentences of its courts in civil and criminal cases null and void, and the officers who carried their decisions into operation, answerable as trespassers, if not in some cases as criminals."

Coming to review the question, attention was directed to the fact that the courts of Rhode Island had recognized the complete dominancy in fact of the charter government, and had refused to investigate the legality of the

voluntary government for the purpose of decreeing the established government to be illegal, on the ground (p. 39) "that the inquiry proposed to be made belonged to the political power and not to the judicial; that it rested with the political power to decide whether the charter government had been displaced or not; and when that decision was made, the judicial department would be bound to take notice of it as the paramount law of the State, without the aid of oral evidence or the examination of witnesses, etc." It was further remarked:

"This doctrine is clearly and forcibly stated in the opinion of the supreme court of the State in the trial of Thomas W. Dorr, who was the governor elected under the opposing constitution, and headed the armed force which endeavored to maintain its authority."

Reviewing the grounds upon which these doctrines proceeded, their cogency was pointed out and the disastrous effect of any other view was emphasized, and from a point of view of the state law the conclusive effect of the judgments of the courts of Rhode Island was referred to. The court then came to consider the correctness of the principle applied by the Rhode Island courts, in the light of § 4 of Art. IV, of the Constitution of the United States. The contention of the plaintiff in error concerning that Article was, in substantial effect, thus pressed in argument: The ultimate power of sovereignty is in the people, and they in the nature of things, if the government is a free one, must have a right to change their constitution. Where in the ordinary course no other means exists of doing so, that right of necessity embraces the power to resort to revolution. As, however, no such right it was urged could exist under the Constitution, because of the provision of § 4 of Art. IV, protecting each State on application of the legislature or of the executive, when the legislature cannot be convened, against domestic violence, it followed that the guarantee of a government republican in form

was the means provided by the Constitution to secure the people in their right to change their government, and made the question whether such change was rightfully accomplished a judicial question determinable by the courts of the United States. To make the physical power of the United States available, at the demand of an existing state government, to suppress all resistance to its authority, and yet to afford no method of testing the rightful character of the state government, would be to render people of a particular State hopeless in case of a wrongful government. It was pointed out in the argument that the decision of the courts of Rhode Island in favor of the charter government illustrated the force of these contentions, since they proceeded solely on the established character of that government and not upon whether the people had rightfully overthrown it by voluntarily drawing and submitting for approval a new constitution. It is thus seen that the propositions relied upon in this case were presented for decision in the most complete and most direct way. The court, in disposing of them, while virtually recognizing the cogency of the argument in so far as it emphasized the restraint upon armed resistance to an existing state government, arising from the provision of § 4 of Art. IV, and the resultant necessity for the existence somewhere in the Constitution of a tribunal, upon which the people of a State could rely, to protect them from the wrongful continuance against their will of a government not republican in form, proceeded to inquire whether a tribunal existed and its character. In doing this it pointed out that owing to the inherent political character of such a question its decision was not by the Constitution vested in the judicial department of the Government, but was on the contrary exclusively committed to the legislative department by whose action on such subject the judiciary were absolutely controlled. The court said (p. 42):

"Moreover, the constitution of the United States, as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a State, has treated the subject as political in its nature, and placed the power in the hands of that department.

"The fourth section of the fourth article of the constitution of the United States provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion; and on the application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence.

"Under this article of the constitution it rests with congress to decide what government is the established one in a State. For, as the United States guarantee to each State a republican government, congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts."

Pointing out that Congress, by the act of February 28, 1795 (1 Stat. 424, c. 36), had recognized the obligation resting upon it to protect from domestic violence by conferring authority upon the President of the United States,

on the application of the legislature of a State or of the Governor, to call out the militia of any other State or States to suppress such insurrection, it was suggested that if the question of what was the rightful government within the intendment of § 4 of Art. IV was a judicial one, the duty to afford protection from invasion and to suppress domestic violence would be also judicial, since those duties were inseparably related to the determination of whether there was a rightful government. If this view were correct, it was intimated, it would follow that the delegation of authority made to the President by the act of 1795 would be void as a usurpation of judicial authority, and hence it would be the duty of the courts, if they differed with the judgment of the President as to the manner of discharging this great responsibility, to interfere and set at naught his action; and the pertinent statement was made (p. 43): "If the judicial power extends so far, the guarantee contained in the constitution of the United States is a guarantee of anarchy, and not of order."

The fundamental doctrines thus so lucidly and cogently announced by the court, speaking through Mr. Chief Justice Taney in the case which we have thus reviewed, have never been doubted or questioned since, and have afforded the light guiding the orderly development of our constitutional system from the day of the deliverance of that decision up to the present time. We do not stop to cite other cases which indirectly or incidentally refer to the subject, but conclude by directing attention to the statement by the court, speaking through Mr. Chief Justice Fuller, in *Taylor* v. *Beckham*, *No. 1*, 178 U. S. 548, where, after disposing of a contention made concerning the Fourteenth Amendment and coming to consider a proposition which was necessary to be decided concerning the nature and effect of the guarantee of § 4 of Art. IV, it was said (p. 578):

"But it is said that the Fourteenth Amendment must be

read with section 4 of article IV of the Constitution, providing that: 'The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.' It is argued that when the State of Kentucky entered the Union, the people 'surrendered their right of forcible revolution in state affairs,' and received in lieu thereof a distinct pledge to the people of the State of the guarantee of a republican form of government, and of protection against invasion, and against domestic violence; that the distinguishing feature of that form of government is the right of the people to choose their own officers for governmental administration; that this was denied by the action of the General Assembly in this instance; and, in effect, that this court has jurisdiction to enforce that guarantee, albeit the judiciary of Kentucky was unable to do so because of the division of the powers of government. And yet the writ before us was granted under § 709 of the Revised Statutes to revise the judgment of the state court on the ground that a constitutional right was decided against by that court.

"It was long ago settled that the enforcement of this guarantee belonged to the political department. *Luther* v. *Borden*, 7 How. 1. In that case it was held that the question, which of the two opposing governments of Rhode Island, namely, the charter government or the government established by a voluntary convention, was the legitimate one, was a question for the determination of the political department; and when that department had decided, the courts were bound to take notice of the decision and follow it. . . ."

It is indeed a singular misconception of the nature and character of our constitutional system of government to suggest that the settled distinction which the doctrine just

stated points out between judicial authority over justiciable controversies and legislative power as to purely political questions tends to destroy the duty of the judiciary in proper cases to enforce the Constitution. The suggestion but results from failing to distinguish between things which are widely different, that is, the legislative duty to determine the political questions involved in deciding whether a state government republican in form exists, and the judicial power and ever-present duty whenever it becomes necessary in a controversy properly submitted to enforce and uphold the applicable provisions of the Constitution as to each and every exercise of governmental power.

How better can the broad lines which distinguish these two subjects be pointed out than by considering the character of the defense in this very case? The defendant company does not contend here that it could not have been required to pay a license tax. It does not assert that it was denied an opportunity to be heard as to the amount for which it was taxed, or that there was anything inhering in the tax or involved intrinsically in the law which violated any of its constitutional rights. If such questions had been raised they would have been justiciable, and therefore would have required the calling into operation of judicial power. Instead, however, of doing any of these things, the attack on the statute here made is of a wholly different character. Its essentially political nature is at once made manifest by understanding that the assault which the contention here advanced makes it not on the tax as a tax, but on the State as a State. It is addressed to the framework and political character of the government by which the statute levying the tax was passed. It is the government, the political entity, which (reducing the case to its essence) is called to the bar of this court, not for the purpose of testing judicially some exercise of power assailed, on the ground that its exertion has injuriously

affected the rights of an individual because of repugnancy to some constitutional limitation, but to demand of the State that it establish its right to exist as a State, republican in form.

As the issues presented, in their very essence, are, and have long since by this court been, definitely determined to be political and governmental, and embraced within the scope of the powers conferred upon Congress, and not therefore within the reach of judicial power, it follows that the case presented is not within our jurisdiction, and the writ of error must therefore be, and it is, dismissed for want of jurisdiction.

Dismissed for want of jurisdiction.